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No. 217

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

On Appeal From The United States District Court For The District of Kansas.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

This appeal is filed on behalf of the State Corporation Commission of the State of Kansas.

OPINION BELOW.

The opinion of the United States District Court for the District of Kansas (not yet reported) is attached hereto as Appendix A. The final judgment of the District Court, dated April 10, 1963, is attached hereto as Appendix B. Notice of Appeal was filed in the United States District

Court for the District of Kansas on April 29, 1963, a copy thereof is attached hereto as Appendix C. The decision of the Interstate Commerce Commission, dated December 1, 1961, is reported at 315 ICC 223 and is attached hereto as Appendix D. The report of the trial examiner is attached hereto as Appendix E.

JURISDICTION.

This action was brought under 28 USC 1336 and 28 USC 2321 to 2325, inclusive, to enjoin, annul, and set aside an order of the Interstate Commerce Commission. The decree of the District Court was entered on April 11, 1963. The State Corporation Commission of the State of Kansas filed its notice of appeal in that Court on April 29, 1963.

The jurisdiction of this Court is conferred by 28 USC 1253 and 2101 (b).

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case:

State of Florida v. United States, (1931) 282 U. S. 194;

Public Service Commission of Utah v. United States, (1958), 356 U.S. 421.

STATUTES INVOLVED

The following statutes are involved: The National Transportation Policy, 49 USC preceding Sections 1, 301, 901, and 1001; and Section 49 USC, Sections 13(3) and 13 (4), and Section 10(e) of the Administrative Procedure Act, 5 USC §1010(e). These statutes are set forth in Appendix F.

QUESTIONS PRESENTED.

The questions presented by this appeal are as follows:

In 1958 Congress enacted an amendment to that part of §13(4) of the Interstate Commerce Act which provides that the Interstate Commerce Commission can order an increase in intrastate rates where such rates cause an unjust discrimination against, or undue burden on, interstate commerce, by parenthetically adding the words: "which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any state."

1. When making an order requiring an increase in an intrastate rate on a specific commodity, does this amendment make it unnecessary for the Interstate Commerce Commission to consider the effect such increase may have upon the volume of intrastate traffic in that commodity and authorize basing such order upon evidence related exclusively to the total revenue effect of system-wide increases on all commodities?

2. Since the enactment of Section 10(e) of the Administrative Procedure Act, is the reviewing court not required to consider and independently weigh the findings of the trial examiner and testimony and evidence opposed to the findings of the Interstate Commerce Commission, in determining whether or not the findings of the Commission are supported by substantial evidence?

STATEMENT.

This action was brought to set aside an order of the Interstate Commerce Commission. This appeal is to review an order dismissing the complaint.

The action before the Interstate Commerce Commission was an investigation instituted upon petition of the Class I railroads which serve Kansas, into the lawfulness of certain Kansas intrastate rail freight rates.[1] The evidence offered by the railroads to support the allegation that the intrastate rates cause an unjust discrimination against or an undue burden on interstate commerce consisted of an employee of each of the various railroads testifying that in the past general increases in all freight rates on the rail system by which the witness was employed had resulted in an increase in the system over-all freight revenue. From this fact he was permitted to give as his opinion that an increase in the Kansas intrastate rates on the commodities under investigation would result in an increase in rail revenues. No study or investigation of the conditions surrounding the movement of these particular commodities had been made.

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[1] Cement; brick; crushed stone, sand, gravel, road aggregates, chat, and agricultural limestone; bituminous coal; clay drain tile, clay sewer pipe, and related articles; lightweight building aggregates; hay; petroleum and petroleum products; and refractories and related articles. Subsequently, cement and brick were withdrawn from the proceeding by the rail carriers, and the action as to bituminous coal, and refractories and related articles was dismissed by the Commission.

The Commission made the finding, heretofore held essential by this Court,[2] that an increase in the intrastate rates would result in greater rail revenues on the specified commodities. This was done despite the complete lack of evidence concerning the specific commodities by proponents of the increases. It is the position of Appellant that the finding was necessary and that the evidence was not sufficient to support it. The trial court has held that the 1958 amendments to § 13(4) made it unnecessary to consider the effect an increase in rates might have on the intrastate movement of a commodity and, hence, unnecessary to consider earlier cases holding to the contrary. The Court also holds that the 1958 amendment to § 13(4) makes it proper to receive testimony of a witness as to his opinion of the revenue effect of applying rate increases to a specific commodity, although the witness has made no study or investigation of the particular commodity. In short, the Court holds both that the 1958 amendment made the finding unnecessary and also changed the evidentiary requirements necessary to support the finding. After noting the 1958 amendment to § 13(4), the trial court states:

> ". . . since section 13(4) above set out provides specifically that the Interstate Commerce Commission may find without a separation of interstate and intrastate property, revenues, and expenses and without considering in totality the operations or results thereof of any carrier, or group of carriers, wholly within any state, further emphasis must be placed on the necessary profitable operation of the interstate carriers. Under such circumstances, it seems unnecessary

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[2] *King v. United States*, 344 U. S. 254; *Public Service Commission of Utah v. United States*, 356 U. S. 421.

> to discuss previous cases which considered the revenue from various commodities and products separately and which considered the effect that an intrastate rate increase might have upon the railroad's intrastate traffic in that commodity." (App. A, p. 6)
>
> • • • • •
>
> "Plaintiff however, insists that opinions offered by the railroad's traffic experts do not rise to the dignity of being 'informed judgments', and that the testimony of these witnesses was given *ex cathedra* without the benefit of study or investigation of the commodities involved. In passing, note should be taken of the fact that this contention was first sustained by the examiner who later reversed his position and accepted the proffered testimony. In this the examiner was correct; the provisions of Sec. 13 par. (4) as last amended permits this to be done." (App. A, p. 7)

The trial court appears to have felt that it was not required, in determining the substantiality of the evidence to support the order, to consider the extent to which cross-examination, the findings of the trial examiner, and opposing testimony may have detracted from that substantiality. A full reading of the decision of the trial court leads to no other conclusion. Evidentiary of the fact that the court looked only to evidence supporting the order are the following:

1. No mention is made of findings of the examiner which are diametrically opposed to those of the Commission. For example, the trial examiner found: "Under the circumstances of this record as to crushed stone, sand, gravel, road aggregates, including chat, it is extremely unlikely that an increase in the rates on these commodities would

result in increasing the respondent's revenues." (App. E, p. 86)

The Commission found: ". . . we conclude from all the evidence that the increases sought will result in a substantial increase in the respondents' revenues." (315 ICC p. 240; App. D, p. 51)

No mention of this and similarly opposed findings are made in the court's decision.

2. The court quotes *verbatim* from the testimony of each rail witness, but makes no note of the cross-examination of the witness. The following example is representative of the cross-examination of each rail witness. The court sets out *verbatim* the direct testimony of rail witness Clarence E. Roberts. This ends with a question as to whether he has an opinion as to whether or not general increases will increase rail revenues. The witness answers: "It does, yes, it is my opinion that it does."

The Court makes no mention of the cross-examination of the witness where it was established that the witness would make no attempt to forecast results as to the commodities involved in the proceeding. For example, the witness was asked if in his opinion there would be a diversion of clay sewer pipe from the rail lines if the rates were increased on that commodity. His answer: "Well, it would be only speculative. I don't know whether there would be or not, that would remain to be seen." (Tr. 105)

3. There was extensive evidence of shippers in opposition to the increases, showing that past intrastate increases on these commodities had resulted in extensive losses of rail traffic. The trial examiner summarizes much of this

testimony. (App. E, pp. 82 to 84). For example, the trial examiner notes that although the Kansas production of crushed stone, sand, gravel, chat and road aggregates increased 16.31 percent between 1954 and 1958, rail shipments by members of the Associated Aggregate Shippers of Kansas decreased 42.28 percent. (App. E, p. 81) The decision of the court makes no mention of the extensive opposing testimony from which this and similar findings of fact were made by the trial examiner. This opposing testimony concerning the specific commodities strongly detracted from the substantiality of the evidence on which the Commission relied to support its order. As far as can be seen, it was not considered by the trial court.

The following excerpts from the decision of the court lends conviction that the court felt that it was neither required nor empowered to exercise its independent judgment on the whole record in determining the substantiality of the evidence supporting the Commission's order:

> "This Court has had previous occasions to consider actions of this character. On these other occasions, it has determined that the scope of judicial review is very limited under the doctrine of administrative finality and that administrative orders of the Interstate Commerce Commission entered by it in the exercise of its powers, when dealing with matters particularly under its juridiction are not to be set aside by this court on review unless such orders are found to exceed constitutional limits, are based upon a mistake of law, have been made without the required hearing, are found to be unsupported by the evidence submitted and considered by the Commission in making its determination, or for some other reason may be found

to be an abuse of power by the body acting within the scope of its authority."

* * * * *

" . . . Plaintiff complains that the evidence offered by these witnesses was based on consideration of the effect of general increases on all commodities in the past and not upon what the result might be in the future as to particular commodities. As stated previously, in this proceeding the Commission is not obliged to consider reasonableness of each individual rate before carrying into effect the necessary increased schedule. The Commission may provide in its order for modification of the general order in specific situations where the general order might not be justly applicable. (See *King v. U. S.* 344 *U. S. 254, 275,* (*1952*). This, the Commission by its order, made provision for in this case.

"The question of the weight of the evidence was for the Commission and not for the Court. The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case, there is unjust discrimination against interstate commerce and that purpose extended to the prohibited discrimination produced by intrastate rates. In such a situation, when the Commission exercises its authority after hearing and proper application of rules of law, its findings of fact supported by substantial evidence are not subject to review. The Court may not substitute its judgment for that of the Commission. (See *State of Florida v. U.S.*, 292 U.S. 1, 12, 54 S. Ct. 605, 78 L. Ed. 1077.)"

These statements of the court, coupled with its failure to mention the mass of evidence opposed to the findings of the Commission, including the trial examiner's report, lead

to the conviction that the court misconceived the breadth of judicial review required by Section 10 (e) of the Administrative Procedure Act and by the decisions of this Court delineating the requirements in cases such as this where federal power is exerted in a field reserved normally for state jurisdiction.

It seems evident that the Court felt itself required to restrict its review to investigation of so much of the evidence as supports the Order of the Commission, without regard to opposing evidence which detracts therefrom, the rule of review prior to enactment of § 10(e) of the Administrative Procedure Act. Having found evidence which it felt, standing untested by the opposing evidence, was sufficiently substantial to support the order, the trial court went no further. Its statements above quoted, coupled with its failure to mention any of the opposing evidence, or to note the trial examiner's contrary findings, and cross-examination which largely detracted from the direct testimony, attests to this fact.

The issues here are important in defining the field within which a state may exercise jurisdiction of its own commerce. The trial court construes § 13(4) to permit federal power to over-ride state control of intrastate commerce upon considerations relating exclusively to interstate commerce, no consideration being given to the effect such action might have upon the movement of specific intrastate commerce. This effectively eliminates state control of intrastate commerce. Also, the review here allowed is more restricted than was the case in this type of action even prior to the enactment of § 10(e) of the Administrative Pro-

cedure Act; that the statute, intended to enlarge the scope of review, is nullified by the decision.

CONCLUSION.

For the reasons above stated, the questions presented by this appeal are substantial and of public importance. It is submitted that probable jurisdiction should be noted.

Respectfully submitted,

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Topeka, Kansas
June 17, 1963

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES DISTRICT OF KANSAS

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Plaintiff,	)	CIVIL Action No. T-3169
vs	)	
THE UNITED STATES OF AMERICA, Defendant.	)	

MEMORANDUM OF DECISION.

This action was brought by the Kansas Corporation Commission to enjoin, annul, and set aside an order entered July 31, 1962, by the Interstate Commerce Commission in a proceeding entitled "No. 33239, Kansas Interstate Freight Rates and Charges." Upon petition of thirteen principal railroads operating in Kansas, the Interstate Commerce Commission commenced an investigation under section 13 (4) of the Interstate Commerce Act to determine whether or not rates and charges of the common carriers by railroad, or any of them, for the intrastate transportation of certain commodities made or imposed by authority of the State of Kansas had caused or will cause, by reason of the failure of such rates and charges to include increases corresponding to those permitted by the Interstate Commerce Commission in the interstate rates and charges on like traffic in Ex Parte Orders Nos. 206 and 212, any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other, or any undue, unreasonable, or unjust dis-

crimination against, or undue burden on, interstate or foreign commerce; and, if so, to determine what rates and charges should be prescribed to remove any unlawfulness found to exist.

After a hearing, the Interstate Commerce Commission made findings which are hereinafter set out:

"1. The conditions incident to the intrastate transportation within Kansas of crushed stone, sand, gravel, road aggregates, chat, and agricultural limestone; clay draintile, clay sewer pipe, and related articles; lightweight building aggregates, including expanded clay or shale cinders; hay; and petroleum and petroleum products are no more favorable than those incident to the interstate transportation of like traffic to, from, and through points in Kansas.

2. The amounts and percentages by which interstate freight rates and charges on the commodities named in finding 1 between points in Kansas and points in adjoining States were increased, as authorized in Ex Parte Orders Nos. 206 and 212, are just and reasonable.

3. The present Kansas intrastate freight rates on the commodities named in finding 1, imposed by authority of the State, are abnormally low, and are not contributing their fair share of the revenues required by the respondents to enable them, under honest, economical and efficient management, to provide adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, thereby accomplishing the purposes of the Interstate Commerce Act, as set forth in the national transportation policy declared by the Congress, to develop and preserve a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense.

4. The burden thus cast upon interstate commerce is undue in and to the extent that those intrastate rates

and charges are less than they would be on the basis herein approved; and such intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against, and an undue burden on, interstate commerce.

5. The unlawfulness herein found to exist should be removed by applying to the Kansas intrastate rates and charges, on the commodities described in finding 1, the same respective increases as are maintained by the respondents on like interstate traffic between points in Kansas and points in adjoining States, as authorized in Ex Parte Orders Nos. 206 and 212, provided that increases may not be made in intrastate rates to levels higher than the interstate rates on like traffic to, from, or through points in Kansas, for like or greater short-line distances over the same lines of railroad.

6. The establishment of increases in rates and charges as provided in finding 5 will not result in unreasonable rates or charges, nor in rates or charges that are unreasonable in relation to interstate rates or charges, and will increase the revenues of the respondents by substantial amounts.

7. The present intrastate rates on bituminous coal, and on refractories and related articles, are not shown to cause undue or unreasonable, advantage, preference, or prejudice, or undue, unreasonable, or unjust discrimination against, or an undue burden on, interstate or foreign commerce." (315 I.C.C. 223 at p. 241.)

The foregoing findings were implemented by an order of the Interstate Commerce Commission under date of July 31, 1962. Thereafter, after this Court had issued a temporary restraining order staying the effectiveness of the Commission's order, the Commission itself on September 11, 1962 issued a further order postponing indefinitely

compliance with its order of July 31, 1962 until the completion of judicial review.

This Court has had previous occasions to consider actions of this character. On these other occasions, it has determined that the scope of judicial review is very limited under the doctrine of administrative finality and that administrative orders of the Interstate Commerce Commission entered by it in the exercise of its powers, when dealing with matters particularly under its jurisdiction are not to be set aside by this court on review unless such orders are found to exceed constitutional limits, are based upon a mistake of law, have been made without the required hearing, are found to be unsupported by the evidence submitted and considered by the Commission in making its determination or for some other reason may be found to be an abuse of power by the body acting within the scope of its authority. (See State Corpn. Com. of Kansas v. U.S.A., 184 F. Supp. 691, and cases therein cited.)

Applying these rules to the instant situation, it is readily apparent that we must first determine whether or not the Interstate Commerce Commission has applied an erroneous rule of law in reaching its conclusion that the Kansas Corporation Commission's intrastate rates upon certain commodities are undue, unreasonable, unjust, and an undue burden on interstate commerce.

The particular section under which the Interstate Commerce Commission predicated its action reads as follows:

> "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or

prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner is, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden; Provided, That upon the filing of any petition authorized by the provisions of paragraph (3) of this section to be filed by the carrier concerned, the Commission shall forthwith institute an investigation as aforesaid in to the lawfulness of such rate, fare, charge, classification, regulation, or practice (whether or not theretofore considered by any State agency or authority and without regard to the pendency before any State agency or authority of any proceeding relating thereto) and shall give special expedition to the hearing and decision therein. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding." [49 U.S.C.A. §13 (4)]

It is clear to the Court, after examining this section and the entire record, that whether or not the rates imposed by the Kansas Corporation Commission have created an unreasonable or unjust discrimination against inter-

state commerce is determined primarily by criteria or factors pertaining to the over-all profitable operation of the railroad carriers involved in interstate commerce. Also, a factor that may be considered is the likelihood, or unlikelihood, that rail traffic in the various commodities involved may be consigned via truck carriers upon an increase in the intrastate rates. However, in the final analysis, it is system-wide experience that warrants the greatest consideration because, in that way, the purposes of the Interstate Commerce Carrier Act can best be effectuated. Furthermore, the Interstate Commerce Commission must construe the act to "promote safe, adequate, economical and efficient service and foster sound economic conditions and transportation . . . " In addition, since section 13(4) above set out provides specifically that the Interstate Commerce Commission may find without a separation of interstate and intrastate property, revenues, and expenses and without considering in totality the operations or results thereof of any carrier, or group of carriers, wholly within any state, further emphasis must be placed on the necessary profitable operation of the interstate carriers. Under such circumstances, it seems unnecessary to discuss previous cases which considered the revenue from various commodities and products separately and which considered the effect that an intrastate rate increase might have upon the railroad's intrastate traffic in that commodity.

Upon an examination of the record, we must conclude that the Interstate Commerce Commission applied the correct rule of law to the problem which was before it for consideration.

Plaintiff however, insists that opinions offered by the railroad's traffic experts do not rise to the dignity of being "informed judgments", and that the testimony of these witnesses was given *ex cathedra* without the benefit of study or investigation of the commodities involved. In passing, note should be taken of the fact that this contention was first sustained by the examiner who later reversed his position and accepted the proffered testimony. In this, the examiner was correct; the provisions of Sec. 13 par. (4) as last amended permits this to be done.

A conclusion of the Interstate Commerce Commission, based upon supporting data, including estimates of experienced railroad traffic men, that the probability of increased revenue was sufficiently great to make increases of rate a reasonable exercise of sound managerial judgment is sufficient to meet the requirements of the statute. (See *United States v. Louisiana*, 290 U.S. 70, 80, 54 S. Ct. 78 L. Ed. 181.) The opinions of railroad traffic experts in judging the effect of an increase in intrastate rates is substantial evidence of value. (See *State of South Carolina v. United States*, 136 F. Supp. 897, affirmed per curiam 351 U.S. 944.)

Now, it is the contention of the plaintiff that the order of the Interstate Commerce Commission, if not set aside, will nullify the order of the Kansas Corporation Commission relating to intrastate rates applicable to certain commodities which move by rail in Kansas. Plaintiff asks this Court to determine that the Interstate Commerce Commission did not have evidence sufficiently conclusive of the unlawfulness of the intrastate rates to justify that Commission in substituting higher rates for intrastate ship-

ments that was determined to be proper by the Kansas Corporation Commission. In this connection, plaintiff points out that intrastate transportation is primarily the concern of the State, and Federal power exists only when intrastate tariffs are so low that an undue or unreasonable advantage, preference or prejudice is created as between persons or localities in interstate commerce on the one hand and in interstate commerce on the other, "or when those rates cast an undue burden on interstate commerce." Plaintiff contends that before a state rate may be nullified, the justification for the exercise of Federal power must clearly appear and that the proof offered must meet a high standard of certainty. (*Cf. Public Service Commission of Utah vs. U.S.*, 356 U.S. 421 (1958) 785 Ct. 796, 21 Ed. 2d 886.)

The evidence on which the Interstate Commerce Commission based its conclusion that an increase in intrastate rates would not divert traffic from the railroads but would in turn increase the revenue of the railroad without an appreciable increase in expenses is both documentary and direct.

Mr. Herman C. Kroll, Manager of the Statistical Bureau of the Western Traffic Association presented Exhibit #35. This Exhibit shows that Kansas railroads handled 4.60 per cent more ton-miles in 1958 than in 1946 and earned 51.05 per cent more gross freight revenue in 1958 than was earned in 1946. The years 1946 to 1958, inclusive, were years of recurring interstate and intrastate rate increases, and the evidence in this exhibit shows that any traffic diversion which might have resulted from the progressively

higher rates was not sufficient to defeat the purpose of the rate increases; that is, the production of greater revenue. The same conclusion is even more apparent in examining page 2 of Exhibit 35 which shows the revenue trends of these same railroads considering only Kansas interstate and intrastate traffic; the ton-mile of Kansas traffic rose 4.03%. Mr. Kroll's comments concerning Exhibit 35 were as follows:

> "The exhibit which has been marked for identification as 35 has been prepared for the purpose of demonstrating what the experience of the carriers has been with the Ex Parte increases which have become effective in the post-war period. (R. 336.)
>
> * * * * * * * * * * *
>
> The information shown in column 4, I believe, demonstrates that the Ex Parte increases have accomplished exactly what the carriers intended them to do, and that is to produce substantially increased revenues on rather short notice, because with the ton miles in 1958 4.6 per cent higher than they were in 1946, the gross freight revenue is 51.05 per cent greater.
>
> On page two of this exhibit, I have made a similar comparison, but here I am dealing with the tons, ton miles and revenues of traffic handled to, from, through and within the state of Kansas. Here we find a very similar situation to what was true of the system operations.
>
> I will not burden the record by reading all the figures, but will merely use 1958 as an example. The tons carried in 1958 were approximately three per cent less than they were in 1946. Nevertheless, the revenue ton-miles were 4.03 per cent greater and the revenue was 56.44 per cent greater. (R. 337)
>
> Q. (by Mr. Gray) It's not intended to prove that you get any additional revenue even though the particu-

lar increases sought here are granted, is that correct?

A. Well, Mr. Gray, as a statistician, I think that Exhibit 35 leads you almost to the inescapable conclusion that there are going to be some increased revenues, but I don't feel as a statistician I can say with any preciseness . . ." (R. 342)

Supplementing Mr. Kroll's presentation were the exhibits and testimony of experienced traffic officials of five of the major Kansas railroads. Exhibit 19, for example, illustrated the experience of the Atchison, Topeka & Santa Fe Railway system with rate increases and was prepared in the same general form as Exhibit 35 which applied to the Kansas railroads as a group. Mr. Clarence E. Roberts, Assistant General Freight Agent of the Santa Fe, who had 20 years of freight traffic experience, testified as follows:

"While there has been a diversion of a small amount of traffic to other forms of transportation, much of it is a natural diversion which has continued over a long period of years due to ability to secure certain products from nearby sources of supply and while, no doubt, this diversion will continue to some extent, past increases have resulted in an over-all increase in revenue and I am convinced that what we are here seeking will have the same result.

Exhibit A-19, consisting of two pages, shows the trend of freight traffic tonnage and gross revenue of the A.T. & S.F. Railway Company System for the years 1946 through 1959. The year 1946 is used as Index 100 or the base year as the Ex Parte 162 interim increase which became effective July 1, 1946, was the first general increase following World War II.

It will be noted from this exhibit that the total tonnage handled in every year since 1946 has been

greater that the tonnage handled in 1946, also that the tonnage handled during 1958 represented 112.6 per cent of the tonnage handled in 1946, and that the tonnage in 1958 was considerably greater than that handled in 1957. The exhibit also shows that the revenue has increased percentagewise to a much greater extent than has the tonnage. For example, the 1958 revenue represented 164.6 per cent and 1959 revenue was 175 per cent of the 1946 revenue.

Exhibit 19 also shows the dates on which the various general ex parte increases became effective and while there have been fluctations from year to year due to leveling off of business activities and drought conditions, such increases have definitely resulted in increased revenue.

It will be noted that the second interim Ex Parte 166 increase became effective January 5, 1946, and the final Ex Parte 166 increase became effective August 21, 1948, and while the 1948 tonange fell off slightly from 114.1 per cent in 1947 to 113.9 per cent of the same 1946 tonnage, the revenue for 1948 increased from 122.5 per cent in 1947 to 113.9 per cent of the same 1946 tonnage, the revenue for 1948 increased from 122.5 per cent in 1947 to 139.9 per cent of the 1946 revenue.

In similar proceedings where Kansas rail carriers have sought general increases on Kansas intrastate traffic to the same extent as authorized on interstate traffic under the various ex parte orders, it had been claimed that such increases would result in diversion of most, if not all, of the movement of various commodities to other forms of transportation. Our experience has been that such diversions have been relatively small and it is my considered opinion that generally such diversions under the proposed increases will also be small." (R. 52-54)

* * * * * * * * * * *

"Q. (by Mr. Huston) Based upon the experience of the Santa Fe System with general freight rate increases since 1946, do you have an opinion as to whether or not general increases result in the production of increased revenue?

A. It does, yes, it is my opinion that it does." (R. 107)

Mr. Roberts, in addition presented Exhibit 3 showing all Kansas intrastate and interstate carload terminations of the involved commodities based upon a traffic study for the month of September, 1959 (R. 27-29, Exs. 3, 4.)

Mr. William A. Streck, Commerce Agent of the Missouri Pacific, discussed Exhibit 23 which showed that during a period of recurring rate increases that railroad system's gross freight revenues in 1959 were 137 per cent of the 1946 revenues, and concluded by stating:

"This evidence should be convincing that the general increases as authorized during these years have resulted in increased revenue for the Missouri Pacific." (R. 135)

Mr. Frank A. Verchota, Assistant General Freight Agent of the Chicago, Rock Island & Pacific Railroad, who had had 34 years of freight traffic experience, discussed Exhibit 24, plus added data for 1959, indicating that the Rock Island's system tonnage for 1959 was 106.3 per cent of that of 1946, while the freight revenue was 155.3 per cent of the 1946 level. (R. 176-177) A significant extract from this testimony follows:

"Q. Mr. Verchota, do you have an opinion as to whether the rate increases proposed in this case would result in increased freight revenue?

A. Yes.

Q. What is that opinion?

A. It is my opinion that the proposed rate increases will result in increased freight revenue.

Q. What is the basis for your opinion?
A. Well, based on my Exhibit 24, the over-all picture shows that we had a substantial gain in our gross revenue earnings." (R. 178)

Mr. William R. Wientge, Commerce Assistant of the St. Louis-San Francisco Railway, discussed Exhibit 25 showing that company's tonnage and freight revenue for each year from 1946 through 1959 (R. 182). Exhibit 25 indicated that the Frisco's system tonnage for 1959 was only 91.5 per cent of that of 1946 while system revenue in 1959 was 150 per cent of that of 1946, demonstrating that a loss in traffic does not necessarily make rate increases self-defeating. Mr. Wientge concluded that:

"My opinion is that my Exhibit 25 indicates that the various ex parte increases have resulted in increased revenue for the Frisco and that the application of increases as sought will result in a further revenue increase."

Mr. W. S. Durfee, Chief of the Commerce Bureau of the Union Pacific Railroad, who had nearly 30 years of freight traffic experience, presented and discussed Exhibit 26, showing the Union Pacific's experience in trends of tonnage and revenues for each year from 1946 through 1959. Pertinent extracts from his testimony follow:

"Q. (by Mr. Higgins) Now, Mr. Durfee, bearing in mind the information shown on Exhibit 26 and the experience of your company with freight revenue after the application of various increases both specific and general, do you have an opinion as to the effect of the increases requested in this

proceeding on a number of different commodities upon the revenue of your company?

* * * * * * * * * * *

A. I do.

* * * * * * * * * * *

Q. (by Mr. Higgins) What would be your opinion as to the effect on the revenue of the Union Pacific if the increases here sought by the railroad respondents were granted?

A. Over a period of years?

Q. In your opinion what would the effect be?

A. We would receive increased revenue." (R. 205-207)

These witnesses, representing the railroad systems operating in Kansas, and familiar with the traffic rates and revenues of the various companies, testified with certainty that while there might be some diversion of traffic, (by reason of the increase in rates) the net result of the increase of rates would be to substantially increase revenues. Plaintiff complains that the evidence offered by these witnesses was based on consideration of the effect of general increases on all commodities in the past and not upon what the result might be in the future as to particular commodities. As stated previously, in this proceeding the Commission is not obliged to consider reasonableness of each individual rate before carrying into effect the necessary increased schedule. The Commission may provide in its order for modification of the general order in specific situations where the general order might not be justly applicable. (See *King v. U.S.*, 344 U.S. 254, 275, (1952) This, the Commission by its order, made provision for in this case.

The question of the weight of the evidence was for the Commission and not for the Court. The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things whether upon the facts in a given case, there is unjust discrimination against interstate commerce and that purpose extended to the prohibited discrimination produced by intrastate rates. In such a situation, when the Commission exercises its authority after hearing and proper application of rules of law, its findings of fact supported by substantial evidence are not subject to review. The Court may not substitute its judgment for that of the Commission. (See *State of Florida v. U.S.*, 292 U.S. 1, 12, 54 S. Ct. 605, 78 L. Ed. 1077)

We think the Interstate Commerce Commission had before it all of the evidence which was necessary for it to make a proper decision in accordance with the criteria which must be considered in making a decision. Consequently, its judgment must be affirmed.

Counsel for defendants are directed to prepare and submit a journal entry in accordance with the unanimous decision of the Court.

IT IS SO ORDERED.

Dated at Topeka, Kansas this 30 day of March, 1963.

(Signed) George Templar,

GEORGE TEMPLAR,
United State District Judge.

APPENDIX B.

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF KANSAS

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,	)	
Plaintiff,	)	Journal Entry
vs.	)	Civil Action
THE UNITED STATES OF AMERICA,	)	No. T-3169
Defendant.	)	

JUDGMENT.

The above entitled cause having come on for final hearing before a duly constituted district court of three judges convened pursuant to Sections 2284 and 2326 of Title 28, United States Code, and the Court having considered the pleadings the record before the Commission, and the arguments and briefs of counsel, and the Court being fully advised in the premises and having filed its unanimous memorandum of decision on March 30, 1963, it is hereby

ORDERED, ADJUDGED and DECREED that the relief prayed for in the complaint be, and it is hereby, denied, the complaint is dismissed, and the temporary restraining order, heretofore entered on September 6, 1962, be and it is hereby, dissolved.

Dated this 10th day of April, 1963.

/s/ Delmas C. Hill,

Judge, United States
Court of Appeals

/s/ Arthur J. Stanley, Jr.

Judge, United States District Court

/s/ George Templar

Judge, United States District Court

ATTEST: A true copy.

CHARLES W. CAHILL, Clerk
By L. Bernice Lutes,
Deputy

FILED
APRIL 11, 1963
CHARLES W. CAHILL, Clerk
By /s/ L. Bernice Lutes, Deputy

APPROVED

/s/ Elmer Hoge, Ass't U.S. Attorney
Attorney for Defendant

/s/ Roth A. Gatewood
Attorney for Intervenors

/s/ Byron M. Gray
Attorney for Plaintiff

APPENDIX C.

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF KANSAS

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, Plaintiff,	)	
vs.	)	Civil Action
THE UNITED STATES OF AMERICA, Defendant.	)	No. T-3169

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

I. Notice is hereby given that the State Corporation Commission of the State of Kansas, plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order dismissing the complaint, entered in this action on April 11, 1965.

This appeal is taken pursuant to 28 U.S.C. §1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record of this proceeding in this Court.

III. The following questions are presented by this appeal:

In substituting federal power for state power and ordering an increase in the intrastate rail rates on a specifically named commodity to remove an alleged burden upon interstate commerce.

1. Is evidence that past general increases in rail rates, systemwide on all commodities, have resulted in an increase in total rail revenues, adequate to support a finding by

the Interstate Commerce Commission that an increase in the rates on a specific commodity, intrastate within a single state, will increase the rail revenues on that commodity?

2. In a judicial reveiw of an order of the Interstate Commerce Commission requiring an increase in intrastate rates on a specific commodity, is the court, in determining whether or not the order is supported by substantial evidence, required by Section 10(e) of the Administrative Procedure Act to consider the evidence to the effect that an increase in the intrastate rates on that commodity will result in such a diminution in rail movement of the commodity as to result in less, rather than more, rail revenues thereon?

3. In such a statutory review, is the reviewing court correct in stating that it is not necessary to consider "the effect that an intrastate rate increase might have upon the railroad's intrastate traffic in that commodity"?

/s/ Byron M. Gray

BYRON M. GRAY, Attorney for
State Corporation Commission of
the State of Kansas,
530 New England Building,
Topeka, Kansas.

PROOF OF SERVICE.

I, Byron M. Gray, attorney for the State Corporation Commission of the State of Kansas, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of April, 1963, I served copies of the foregoing Notice of Appeal to the

Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States, by leaving a copy thereof at the office of Newell George, Esq., United States Attorney for the District of Kansas, at the Federal Building, Topeka, Kansas, and by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Archibald Cox, Esq., Solicitor General, Department of Justice, Washington 25, D. C., to John H. D. Wigger, Esq., Department of Justice, Washington 25, D. C., and to Lee Loevinger, Esq., Assistant Attorney General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies, in duly addressed envelopes, with airmail postage prepaid, to Robert W. Ginnane, Esq., its Chief Counsel, at the offices of the Interstate Commerce Commission, Washington 25, D. C., and to Stanton P. Sender, Esq., Office of General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On the intervening railroad defendants, by mailing copies to each of their counsel of record, in duly addressed envelopes, with first class postage prepaid, where the addressee resides within less than 500 miles from Topeka, Kansas, and with airmail postage prepaid where the addressee resides beyond 500 miles from Topeka, Kansas, to their respective attorneys of record, as follows: John C. Ashton, Jr. Esq., Frisco Building, St. Louis 1, Missouri; William E. Davis, Esq., 114 West 11th Street, Kansas City, Missouri; James D. Gibson, Esq., Midland Valley Railroad, Muskogee, Oklahoma; James A. Gillen, Esq., 547

West Jackson Blvd., Chicago 6, Illinois; William P. Higgins, Esq., 1416 Dodge Street, Omaha 2, Nebraska; Daniel R. Hopkins, Esq., Calihan, Green, Hopkins & Calihan, 118 West Pine Street, Garden City, Kansas; Don McDevitt, Esq., 1025 LaSalle Street Station, Chicago 5, Illinois; Robert H. Stahlheber, Esq., Missouri Pacific Building, St. Louis 3, Missouri; William M. Stapleton, Esq., Lathrop, Righter, Gordon & Parker, 15 West 10th Street, Kansas City 5, Missouri; William A. Thie, Esq., Barrett Building, Denison, Texas; John R. Wallace, Esq., Wallace, Wallace & Owens, Savings & Loan Building, Miami, Oklahoma; and David W. Buxton, Esq., Fleeson, Gooing, Coulson & Kitch, First National Bank Building, Wichita 2, Kansas.

/s/ Byron M. Gray

BYRON M. GRAY, Attorney for State Corporation Commission of the State of Kansas.

APPENDIX D.

INTERSTATE COMMERCE COMMISSION

No. 33239

KANSAS INTRASTATE FREIGHT RATES AND CHARGES.

Decided December 1, 1961

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1. Kansas intrastate rates on crushed stone, sand, gravel, road aggregates, chat, and agricultural limestone; clay draintile, clay sewer pipe, and related articles; lightweight building aggregates, including expanded clay or shale cinders; hay; and petroleum and petroleum products, found to cause unjust discrimination against, and an undue burden on, interstate commerce.
2. Kansas intrastate rates on bituminous coal, and on refractories and related articles, found not shown to be unlawful.
3. Basis for removal of unlawfulness found to exist, prescribed.

Monroe E. Clinton, Ernest D. Grinnel, Jr., William P. Higgins, Harvey Huston, Don McDevitt, and *Toll R. Ware* for respondents.

M. G. Johnson for intervener in support of respondents.

Byron M. Gray and *I. M. Herndon* for State Corporation Commission of Kansas, protestant.

Joseph H. McDowell for Board of Public Utilities of Kansas City, Kans., protestant.

Willard Dunn, H. G. Goudelock, C. A. Hallberg, A. B. Hamilton, James F. Miller, E. J. Robinett, and *Donald R. Wigton* for other protestants.

REPORT OF THE COMMISSION.

HERRING, *Commissioner*:

Exceptions to the report recommended by the examiner, and replies thereto, were filed by certain of the protestants and the respondents. The parties were heard in oral argument. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified. Our conclusions differ, in part, from those recommended by the examiner.

This is an investigation under section 13(4) of the Interstate Commerce Act, instituted upon petition of the 13 principal railroads[1] operating in Kansas, to determine whether rates and charges[2] of the common carriers by railroad, or any of them, for the intrastate transportation of certain commodities, hereinafter referred to, made or imposed by authority of the State of Kansas, cause or will cause, by reason of the failure of such rates and

[1] The Atchison, Topeka and Santa Fe Railway Company; Chicago Burlington & Quincy Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Garden City Western Railway Company; The Kansas City Southern Railway Company; Kansas City Terminal Railway Company; Kansas, Oklahoma & Gulf Railway Company; Midland Valley Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Northeast Oklahoma Railroad Company; St. Louis-San Francisco Railway Company; and Union Pacific Railroad Company. These carriers will be referred to collectively as the respondents, or individually by their short titles.

[2] Rates, charges, increases in rates, and rate differences are stated per 100 pounds, except as otherwise indicated.

charges to include increases corresponding to those permitted by us in the interstate rates and charges on like traffic in Ex Parte Nos. 206 and 212,[3] any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce; and, if so, what rates and charges should be prescribed to remove any unlawfulness found to exist.

All common carriers by railroad operating in Kansas and subject to our jurisdiction were made respondents. Copies of the order of investigation and notice of hearing were served on each of the respondents, the State of Kansas, and the State Corporation Commission of Kansas, hereinafter referred to as the Kansas commission.

A shipper of volcanic scoria from Twin Mountain, N. Mex., appeared in support of the respondents' petition. Representatives of the Kansas commission, the Board of Public Utilities of Kansas City, Kans., and numerous shippers and shipper organizations appeared in opposition to the petition of the respondents, and they are generally referred to herein as the protestants.

On August 6, 1957, in Ex Parte No. 206, we authorized for interstate transportation within Western territory a general increase of 12 percent, with exceptions, in the

[3] Ex Parte No. 206, *Increased Freight Rates, E. and W. Territories*, 1956, 299 I.C.C. 429, and *Increased Freight Rates, E., W., and S. Territories*, 1956, 300 I.C.C. 633; Ex Parte No. 212, *Increased Freight Rates*, 1958, 302 I.C.C. 665 and 304 I.C.C. 289.

freight rates and charges. Upon petition of the respondent to the Kansas commission, they were authorized to make effective corresponding increases in rates for intrastate transportation within that State, except that such increases were not permitted on sand; gravel; crushed stone, including chat; building aggregates, including expanded clay or shale cinders; agricultural limestones; brick; clay sewer pipe; clay draintile and related articles; bituminous coal; petroleum and petroleum products, including liquefied petroleum gas; and cement.

By order of September 9, 1958, in Ex Parte No. 212, we authorized certain additional increases in interstate rates and charges, and upon petition of the respondents to the Kansas commission, they were authorized to make effective corresponding increases for intrastate transportation, except that such increases were not authorized on sand; gravel; crushed stone; chat; road aggregates; light weight building aggregates; agricultural limestone; brick; clay sewer pipe, draintile, and related articles; bituminous coal; petroleum and petroleum products; and hay.

By schedules filed with us, subsequent to the institution of the instant investigation, the respondents proposed a reduction in the level of interstate rates on cement and on brick and related articles, except for commodities like fire brick, classified as refractories, which are subject to rates related to those on brick articles. By applications filed with the Kansas commission, the respondents sought to establish the same basis of intrastate rates on these commodities, except as noted, and by order dated February 9, 1960, the Kansas commission granted the application as

to the intrastate rates on brick and related articles affected by the interstate revision, and those rates became effective on March 11, 1960, on both interstate and intrastate movements. By order dated February 16, 1960, the Kansas commission granted the application as to intrastate rates on cement. By letter dated March 29, 1960, the respondents notified us that the interstate and intrastate adjustment had become effective on March 27, 1960. As a consequence, the intrastate charges on those commodities need not be further considered.

The amounts of the respective increases authorized in the rates and charges on the interstate movement of the commodities here in issue are shown in appendix A to this report. The respondents contend that there are no special circumstances requiring rates on the considered Kansas intrastate traffic which are lower than the rates contemporaneously effective on the same commodities moving interstate to and from Kansas, and that the failure of the Kansas commission to authorize the indicated increases has deprived them of some $745,000 in annual revenues needed to meet the increased cost of operations.

The Kansas commission views the evidence of record as failing to show a clear need for the exercise of our power under section 13(4) of the act, citing *Interstate Commerce Commission v. Miss. Public Service Comm.*, 349 U.S. 908. It is contended that a mere disparity in the intrastate and interstate rates on like traffic is insufficient to justify a finding that the former cause unjust discrimination against or an undue burden on interstate commerce, or unreasonable disadvantage and prejudice to interstate shippers or

localities. The protestants generally urge that an increase in the intrastate rates would not result in a substantial increase in the respondents' revenues.

The protestants objected to the admission of certain statements of railroad officials regarding their opinion that the increases sought would result in greater revenue. Those objections based on the generality of the statements and subsequently bear on the weight they should be accorded. The examiner's consideration of such testimony in his recommended report was proper.

Volume of traffic and annual revenues.—The following table shows the total number of tons of the specified commodities originated on the major class I Kansas railroads in 1958, both intrastate and interstate, together with the percentage which each commodity bears to the total tonnage of all carload traffic originated in Kansas in that year:

Commodity	Tons originated	Percent of total carload traffic
Hay	26,493	0.11
Bituminous Coal	965,458	4.16
Gravel and sand, n.o.s.	572,502	2.47
Stone and rock: broken, ground, and crushed	1,407,964	6.07
Petroleum and petroleum products	1,278,932	5.51
Sewer pipe and clay draintile (not metal)	10,025	.04
Total	4,261,378	18.36
Total carload traffic	23,208,141	100.00

For the month of September 1959, from data compiled by 6 of the respondents, the number of carloads of the considered commodities terminated in Kansas was 3,526 moving intrastate and 1,788 moving interstate. The following table, projecting to an annual basis the data of seven of the respondents for the months of August and November 1958

and February and May 1959, shows the estimated number of intrastate carload shipments and tons terminated, the freight charges at the present rates and including the increases here sought, and the differences between such charges:

Commodities	Carloads terminated	Tons terminated	Freight revenue at present rates	Freight revenue with increases Sought	Revenue differences
Sand	3,732	249,735	$312,813	$358,155	$45,342
Gravel	2,562	172,569	208,140	240,750	32,610
Crushed stone including chat	27,432	1,813,683	3,198,963	3,707,253	508,290
Road and building aggregates	24	1,695	1,614	1,860	246
Lightweight building aggregates; i.e., expanding clay or shale cinders	525	39,054	99,384	114,570	15,186
Agricultural limestone	507	34,071	44,328	56,463	12,135
Clay sewer pipe, clay draintile, and related articles	195	4,866	15,996	21,645	5,649
Bituminous Coal	3,756	222,696	428,511	461,083	32,572
Petroleum and petroleum producets	4,677	132,273	580,989	673,533	95,544
Hay	69	1,392	7,656	9,048	1,392
Total	43,470	2,672,034	4,898,394	5,644,360	745,966

To demonstrate that general rate increases since 1946 have had the desired effect of raising revenues to meet increased expenses, the respondents compared the total of their systemwide tons, revenue ton-miles, and gross freight revenues for the years 1946 to 1958, and made similar comparisons in connection with traffic handled to, from, through, and within Kansas. Considering all traffic during that period, total tons declined 3.39 percent, revenue ton-miles increased 4.6 percent, and gross revenue increased 51.05 percent; and on the traffic related to Kansas, total tons declined 2.95 percent, revenue ton-miles increased 4.03 percent, and gross revenue increased 56.44 percent.

Revenues, property investment, and expenses of respondents.— Eight of the major class I railroads serving Kansas made a detailed group showing of their property investment and income accounts, increases in costs of materials, supplies, and labor, percentage rates of return on property investment, operating ratios, and increased operating efficiency. This evidence is summarized in appendix B to this report, part I thereof being similar to evidence presented to this Commission in Ex Parte Nos. 206 and 212, and part II containing similar information for the period subsequent to those revenue proceedings. Certain of the respondents made substantially similar individual showings, including capital expenditures for modernization and increases in Federal and local taxes.

The table shows a steady increase in gross capital investment by these railroads in the years 1952 through 1957, and a steady increase in net property investment, except for a decline in 1959. Operating income declined irregularly from 1952 through 1959, and the rate of return on the net property investment declined from 4.61 percent in 1952 to 3.37 percent in 1959. A comparison of net operating income for the month of January 1959 and 1960, shows $12,212,687 for the former and $9,462,944 for the latter, while the corresponding operating ratios were 78.23 and 80.06 percent, respectively.

More than 80 percent of the operating expenses of the major class I railroads is comprised of wages and salaries, and materials and supplies, the former representing approximately 60 percent of those combined expenses. From 1952 to November 1959, the average straight-time hourly

rates of compensation rose from $1.824 to $2.448, an increase of about 36 percent. The cost of materials and supplies, including fuel, constitutes approximately 20 percent of the operation expense. As of January 1960, the average unit prices of materials and supplies increased 27.9 percent, fuel increased 5.9 percent, and the weighted-average price of materials, supplies, and fuel was 20.6 percent higher than the corresponding prices in January 1952.

Inflation and higher Federal taxes have also affected the respondents' financial condition. As an example, the Santa Fe shows the effect of these factors in purchasing a new car for one retired in the period 1946-58. During that period, 30,416 new freight cars were purchased and 23,022 were retired. The average cost of a new car was $7,350 and the depreciated value of each car retired was $2,000, so that the purchase of a new car entailed an expenditure of $5,350. In order to obtain the amount necessary for the purchase of the new car, the respondent had to earn $11,146 before taxes.

There has been a continuous improvement in the operating efficiency of the major class I railroads serving Kansas, attributable principally to dieselization. This has materially aided them in absorbing part of the increases in transportation costs and thus in minimizing the impact of rising costs. Average train speeds of 20.87 miles per hour in 1952 increased to 22.43 in 1957, and were maintained at that level in 1958. The average gross ton-miles per freight-train hour of 57,084 in 1952 increased to 71,971 in 1958, and the net freight ton-miles per train-hour increased from 24,373 in 1952 to 29,936 in 1958.

Although the operating revenues of the major class I railroads were higher in 1959 than for any year since 1953, their net operating income was the lowest. The rate of return for 1959 also was lower than that experienced in any of the previous years, and the operating ratio in 1959 was the highest, except in 1954 and 1957.

Interstate operating conditions.—As is generally true in this country, interstate and intrastate traffic is intermingled in the same trains, both local and through, and all of the facilities of the railroads are used indiscriminately in the movement of each. Most of the interstate shipments are handled in through trains, and the preponderance of the intrastate traffic is moved in local trains. The number of crew members on through and local trains is generally the same, but crew members on a local train are paid a higher wage rate, and overtime payments are more frequent in connection with the operation of a local train than a through train. Generally, the tonnage transported on a local train is less than that on a through train, and the average haul of an intrastate shipment usually is less than that of an interstate shipment.

Crush stone, sand, gravel, road aggregates, chat, and agricultural limestone.—Interstate rates for these commodities were prescribed in *Sand, Gravel, and Crushed Stone*, 177 I.C.C. 621 and the same scale was prescribed for intrastate application by the Kansas commission. Subsequently, a truck-competitive scale of rates, approximately 80 percent of the prescribed scale, was established for application generally on interstate and intrastate shipments. Later, a reduced intrastate scale, applicable only

on agricultural limestone, was made effective by the Kansas commission. With that exception, rates on the prescribed basis apply on the intrastate and interstate movements of these commodities. The respondents seek to increase both the intrastate prescribed rates and the truck-competitive scale of rates.

The intrastate rates on these commodities, increased as sought, would be no higher than the concurrently effective interstate rates on like movements. For example, the present joint-line intrastate rates on the prescribed and truck-competitive bases for a distance of 150 miles are $2.55 and $2.12 per net ton, respectively. Increased as sought, the corresponding rates would be $2.95 and $2.44, the same as the present interstate rates for that distance. The intrastate rates on agricultural limestone, increased as sought, would be the same as the concurrently effective interstate rates made on the truck-competitive basis of rates for distances beyond 150 miles, but lower than the corresponding interstate rates predicted on the prescribed basis for the same distances.

Sand, gravel, crushed rock, and agricultural limestone are produced in substantial quantities throughout Kansas. Stone and agricultural limestone deposits are found predominantly in the eastern half of Kansas. The products are heavy loading, are not susceptible to damage in transit, and require no special handling. Sand, gravel, and crushed stone are used principally in road surfacing, including use as ingredients in concrete and asphalt mixes. They are used also as riprap and ballast. Agricultural limestone is used in soil treating, and in certain types of

bituminous surfacing, a large portion of the traffic is billed as crushed rock.

Four producers and shippers of those commodities and the Associated Aggregate Shippers of Kansas, a voluntary nonprofit group hereinafter called the association, oppose the increase. Primarily, they operate permanent-type production installations served by both railroads and trucks. In addition, some of the producers operate portable installations at local deposits near jobsites. They are not located on railroad sidings, but are served entirely by trucks, and movements are generally restricted to distances of less than 50 miles. The establishment of portable plants has limited the marketing area of the output of permanent installations, which generally moves by rail only for distances greater than 50 miles, except in the rare instance when a certain specification can only thus be met.

The association shows the total number of tons of sand, gravel, crushed stone, and agricultural limestone shipped in intrastate commerce by its members (not including sales to railroads), the tons shipped by railroad and truck, and the percentage relation of the rail and truck movement to the association's total movement, for the years 1954 through 1959, as follows:

Year	Total tons	Rail tons	Percent rail tons of total tons	Truck tons	Percent truck tons of total tons
1954	3,781,627	2,127,669	56.26	1,653,958	43.74
1955	4,070,604	2,242,473	55.09	1,828,131	44.91
1956	4,258,759	1,677,162	39.38	2,581,597	60.62
1957	2,609,182	859,194	32.93	1,749,988	67.07
1958	3,279,130	1,228,168	37.45	2,050,962	62.55
1959	3,103,015	1,042,127	33.58	2,060,888	66.42

The total number of tons produced in Kansas increased from 15,053,609 tons in 1954 to 17,509,262 tons in 1958, and the association compares the increase of 16.31 percent to the decline of 42.28 percent in the intrastate rail shipments of its members during the same period. The total intrastate tonnage is not compared.

Certain producers submitted data to show that during the period between 1946 and 1959 production at permanent-type installations decreased because of the inability to compete with wayside plants. For example, from 1946 to 1950, one shipper produced 1,000,000 tons of sand and gravel aggregates, of which 77.6 percent moved by rail; from 1951 to 1955, its production totaled 805,000 tons, of which 68.8 percent moved by rail and from 1956 to 1959, it produced 700,000 tons, of which 38.6 percent moved by rail. Another producer of sand and gravel in 1959 moved 6.4 percent of its production by rail and 93.6 percent by truck. A producer of crushed limestone in 1959 shipped by rail only 68 percent of the tonnage formerly shipped during the period from 1953 to 1958. Over that period production of crushed limestone in Kansas increased from 8,769,000 to 21,419,000 tons.

These commodities are sold on a delivered basis. The producers maintain that in order to discourage the establishment of, or to remain competitive with, wayside plants, they have been compelled either to absorb past increases in rail rates in their selling price, or to reduce the selling price. In one instance, between 1946 and 1959, the rates on the particular product increased to a greater extent than the selling price of the product. One producer showed

that prior to the application of the Ex Parte No. 196 increase, it shipped a total of 11,207 tons of crushed limestone to Topeka. After that increase became effective, it lost the business to wayside pits nearer to Topeka. After a reduction in the rail rates, made at its request, it regained the business, and in 1959 shipped a total of 37,232 tons to Topeka. Between 1954 and 1959, one producer of crushed stone reduced its price from $1.30 to $1.255 a net ton, and to remain competitive it became one of the largest operators of wayside or portable plants.

As indicated in a foregoing table, these commodities are of considerable revenue importance to the respondents, representing about 80 percent of the estimated additional revenue which would be obtained if all of the increases here sought are applied. The table is criticized because it is based on 4 months during which the Ex Parte No. 196 increase had been in effect for less than a month. It might thus overstate the estimated annual intrastate movement, but the indication of the relative importance of these commodities is not seriously impaired. In September 1959, 1,991 carloads moved intrastate in Kansas and 517 carloads terminated in Kansas after interstate movements. A few examples of lost traffic or diversion are cited, but considering the total traffic in these commodities and all of the evidence, we are persuaded that the respondents will obtain a substantial net increase in revenue with the application of the increases sought.

Clay draintile, clay sewer pipe, and related articles.—A history of the rates on these commodities is set forth in *Kansas Intrastate Freight Rates and Charges*, 287 I.C.C.

461. The disparity in the interstate and intrastate rates thereon is illustrated by the following examples. On clay draintile, the present intrastate rate from Humboldt to Topeka, a distance of 113 miles, is 13 cents, and the single-line and joint-line interstate rates, for like distances are 17 and 21 cents, respectively. If the present intrastate rates were increased as sought, by 12 percent and 2 cents as authorized in Ex Parte Nos. 206 and 212 respectively, for a distance of 113 miles, the rate would be 17 cents or the same as the concurrently effective interstate single-line rate for the same distance. On clay sewer pipe, the present intrastate rate for a distance of 169.5 miles is 22 cents, and the corresponding interstate rate is 33 cents. If the present intrastate rate were increased as sought, 12 percent and 5 cents as authorized in the respective ex parte proceedings, the intrastate rate would be 30 cents for the same distance, or 3 cents lower than the concurrently effective interstate rate for the same distance.

Two producers of clay draintile and clay sewer pipe, among other things, oppose increases on these commodities. Both are served by railroad but are utilizing truck transportation to an increasing degree to transport their products. They contend that any further increases in the intrastate rates will result in the diversion of the remainder of the rail movement to truck transportation.

As to draintile, the producer with a plant at Coffeyville shows that 35 percent of its 1959 tonnage was transported by rail and 65 percent by truck. In 1959, it shipped by rail 642 tons of draintile to Wichita, and a total of 26 carloads to seven other points in Kansas. This commodity

is sold on a delivered basis, and in order to show the effect of the proposed increases on its present rail movement, the protestant compares the costs of transporting a shipment by rail and motor to Wichita. On a rail shipment, in addition to the rail charges, the producer incurs a truck charge for moving the shipment from the railhead direct to the jobsite, or two truck charges, one for the movement from the railhead to its yard in Wichita, and another to effectuate delivery. The present total cost including truck delivery to the jobsite is $15.37 per thousand draintile, and with two truck movements, $22.92 per thousand. The total cost for an all truck movement, with delivery direct to the jobsite, is $18 per thousand draintile, and if trucked from origin to the shipper's yard and subsequently to the jobsite, apparently the total cost is $25 per thousand. The proposed increase in intrastate rates would result in a total cost for a rail movement and truck delivery of $17.63 per thousand, and with two truck movements, $24.87 per thousand. A similar comparison of the total charges to the other seven Kansas destinations shows that the present costs by rail are lower than truck costs in four instances, and higher in three. If the rail rates were increased as proposed, the total rail charges to those destinations would exceed the corresponding truck charges in every instance.

Clay sewer pipe, valued at approximately $40 per ton f. o. b. plant, is generally produced close to the source of its basic ingredient, clay. It competes with concrete sewer pipe, the basic ingredients of which are found in many locations, and it can be produced closer to the point of use. As a consequence, the transportation charges incurred for

the movement of this pipe is an important factor in determining whether or not this commodity can compete with concrete sewer pipe. According to the producer of clay sewer pipe, which has its principal plant at Pittsburg, as a result of the series of increases in rail rates, it has diverted most of its traffic from rail to truck. In 1944, 13.8 percent of total production was shipped by truck, compared to 96.5 percent in 1959. During the years 1955, 1956, 1957, 1958, and 1959, respectively, it made 92, 111, 76, 85, and 59 intrastate shipments by rail.

The respondents compare their estimated intrastate terminations of 196 carloads of clay draintile and clay sewer pipe for 1956, as shown in *Kansas Intrastate Freight Rates and Charges*, 305 I.C.C. 335, with their estimated intrastate terminations of 195 carloads in 1959. This stability of movement may be attributable, in part, to the disallowance of intrastate rate increases on this commodity to the level of those authorized in Ex Parte No. 196, as a result of the decision in *Kansas Intrastate Freight Rates and Charges*, 305 I.C.C. 335, *supra*. However, the record shows that on shipments to Wichita the increase proposed would result in a lower rail cost than by truck. Moreover, in the past clay draintile has moved in rail service to three of the other destinations, although the corresponding truck charges for the same service would have been less.

Intrastate rail movements of clay sewer pipe increased after application of the Ex Parte No. 175 increase (effective August 11, 1954) from 92 carloads in 1953 to 11 carloads in 1956, and then declined from 1957 to 1959, when there was no further increase in the rates from 76 to 59 car-

loads. Thus, no relationship is established between increased rates and the volume of traffic.

Lighweight building aggregates, including expanded clay or shale cinders.— A maximum reasonable scale of rates for the interstate movement of these commodities from Kansas City, Mo., to Memphis, Tenn., and destinations in Iowa, Kansas, Nebraska, Oklahoma, Arkansas, Louisiana, and Texas was prescribed by this Commission in *Haydite Co. v. Atchison, T & S. F. Ry. Co.*, 96 I.C.C. 312. This scale of rates has been extended to apply from certain additional Kansas origins, including Wilder and Ottawa, to interstate and intrastate destinations.

Comparision of these prescribed rates shows a disparity in the present interstate and intrastate rates, both for single-line and joint-line hauls. The present interstate joint-line rate, on the prescribed basis, for a distance of 350 miles, is $4.02 per net ton, and for the same distance, the intrastate rate is $3.48. The present intrastate rate, increased as sought, would be $4.02 for the same distance, or the same as the interstate rate on the prescribed basis.

A producer of volcanic scoria at Twin Mountain, N. Mex., supports the proposed increases on expanded clay or shale cinders. Volcanic scoria is a lightweight building aggregate, and is used primarily in the production of building blocks. It is competitive in Kansas principally with expanded clay or shale cinders produced at Ottawa and, to some degree, with lightweight building aggregates produced in Missouri and Oklahoma.

The interstate rates on volcanic scoria and expanded clay or shale cinders are the same, but the intrastate rates are

less than the corresponding interstate rates to the extent that the former have not been increased as herein proposed. For example, from Twin Mountain to Wichita, 434 miles, the present interstate rate on volcanic scoria is $4.48 a net ton, and for the same distance the intrastate rate on expanded clay or shale cinders is $3.89. If the latter rate is increased as sought, it will be $4.48, the same as the interstate rate.

Prior to the application of the interstate increases authorized in Ex Parte Nos. 206 and 212, in 1956 and 1957, the New Mexico producer shipped 818 carloads to Kansas of a total movement of 1,996 carloads. Thereafter, of a total movement of 2,494 carloads, it shipped only 555 carloads to Kansas. During the last 4 months of 1959 and the first 2 months of 1960, of a total movement of 357 carloads, only 18 carloads moved to Kansas destinations. Although the selling price of volcanic scoria, f. o. b. plant, is approximately 35 percent of the price of expanded clay or shale cinders, the producer maintains that if the present disparity in rates is maintained, it cannot continue to market its product in competition with intrastate producers.

No shipper or consignee testified in opposition to the increase in the intrastate rates on these commodities.

Hay.—The interstate rates on hay between points in Oklahoma and points in Arkansas were prescribed in *Oklahoma Corp. Comm. v. Arkansas R.*, 80 I.C.C. 607, and *Oklahoma Corp. Comm. v. Abilene & S. Ry. Co.*, 101 I.C.C. 116, and in subsequent decisions the same scale of rates was prescribed for interstate application between additional points within the Southwest, including Kansas.

Effective May 16, 1954, a reduced interstate scale of rates, designed in part to meet truck competition, was established. On intrastate movements, a lower scale of rates for single-line and joint-line movements, prescribed by the Kansas commission, applies. If the intrastate scales of rates were increased as sought, the resulting rates would be lower in each instance than the interstate rates on the truck-competitive basis, and lower than rates predicted on the prescribed basis.

There is a substantial movement of hay from points in Kansas to Kansas City and St. Joseph, Mo., as well as to the intrastate destinations of Kansas City and Morris. In addition to the scales of rates above referred to, specific commodity rates have been established from Kansas origins to these destinations, which rates are observed as maxima at intermediate destinations in Kansas. On June 30, 1946, the interstate and intrastate rates to the named destinations from common origins in Kansas were the same. With increases applied since 1946, the present interstate rates from Coffeyville to Kansas City and St. Joseph, Mo., are 13 and 10 cents higher than the respective intrastate rates to Kansas City and Morris. If these intrastate rates were increased as sought, they would be 8 and 5 cents lower than the compared interstate rates.

No shipper or consignee testified in opposition to the increases sought on hay.

Refractories and related articles.—The interstate basis of rates on refractories and related articles is related to the rates prescribed on brick and related articles in *Southwestern Brick Cases*, 107 I.C.C. 681, and the intrastate

basis is similarly related to rates prescribed by the Kansas commission. If the present intrastate rates on refractories and related articles were increased as proposed, they would be the same as interstate rates for the same or comparable distances. However, no intrastate movements of refractories and related articles are shown, and there is no basis for the essential finding that the increases would produce a net revenue gain.

Bituminous coal.—Intrastate rates on this commodity were considered in the previous Kansas proceeding, 305 I.C.C. 335. Bituminous coal is mined in southeastern Kansas in the general area of Pittsburg and moves from group origins to Kansas points and to interstate destinations in Iowa, Missouri, and Nebraska. The interstate rates on lump and slack coal[4] from origins in the Pittsburg group to various destinations were prescribed in *Midwest Coal Traffic Bureau v. Arkansas Valley I. Ry. Co.*, 173 I.C.C. 467 and 238 I.C.C. 539. The same scale of rates was prescribed by the Kansas commission for intrastate application. The prescribed basis has been voluntarily reduced to certain interstate and intrastate destinations, primarily on industrial or fine coal, to meet truck and barge competition. The present interstate rates on lump and slack coal from West Mineral, a point within the Pittsburg group, to Topeka is $3.27 and $2.59 per net ton, respectively, compared with $4.31 and $3.82 to the same destination from Cattoosa, Okla. (an origin in the Tulsa group). If the intrastate rates were increased as proposed, they would become

[4] Rates on slack coal also apply on industrial coal, unless rates are specifically published on the latter.

$3.52 and $2.84, and the original relationship in rates from Cattoosa and Pittsburg to Topeka would be restored. Similar prior relationships in rates from Pittsburg and interstate origins in Oklahoma and Arkansas to common points in Kansas would be reestablished. Increased intrastate rates would be no higher than interstate rates for the same or comparable distances, and would be lower than corresponding rates on the prescribed basis.

The respondents seek the increase of 15 cents per net ton authorized in Ex Parte No. 206, except on shipments from Maxine to Clemens No. 22, both points within the Pittsburg group, and on shipments of industrial coal from the Pittsburg group, to Kansas City; and the increase of 10 cents per net ton authorized in Ex Parte No. 212, limited to movements from the Pittsburg group to the same destinations. Prior to the application of the Ex Parte No. 212 increase on interstate movements of industrial coal, rates from the Pittsburg group to Kansas City, Mo., and Kansas City, Kans., were the same, but since the application of that increase the interstate rate is $2.08 per net ton, 10 cents over the intrastate rate. The proposed increase would reestablish the former parity, and rates so increased would be lower than those on the prescribed basis.

The Midwest Coal Traffic Bureau, hereinafter called the bureau, whose members produce over 90 percent of all Kansas coal and over 95 percent of the Kansas coal shipped by rail, and the Board of Utilities of Kansas City, hereinafter called the board, oppose the increases. The bureau contends that the increase would result in a serious

reduction in the volume moved by rail and a net reduction in rail revenues. Reference is made to the drastic decline in the production of coal owing to the great expansion in the use of competitive fuels, and to a continuing diversion of coal traffic to trucks. Kansas coal production has decreased at a greater rate than the decline in national production. During the period 1946 through 1959, national production declined 23.2 percent while Kansas production declined 70.7 percent. The number of Kansas mines operating has decreased from 44 in 1954 to 21 in 1959.

The competitive situation between coal and other fuels, including natural gas, liquefied petroleum gas, and fuel oil, is more acute in Kansas than in other areas of the country. Natural gas and petroleum are produced in the same areas in Kansas which produce coal, and in addition large deposits of both commodities exist in the western half of the State. Natural gas moves by pipeline, and fuel oil and liquefied petroleum gas move predominantly by truck. Those nonsolid fuels have supplanted coal for household and small commercial and industrial uses. Coal is used primarily by the large industrial facilities and public utilities.

Since transportation costs are a significant part of the total cost of coal, increased rail rates have compelled shippers to utilize truck transportation to retain what is left of the market. In 1950, 90.2 percent of Kansas coal production moved by rail and 6.7 percent by truck, compared with 79.2 and 20.7 percent, respectively, in 1958. The rail movement is declining more rapidly than coal production in Kansas; between 1950 and 1958, production declined

61.3 percent while the rail movement declined 66 percent. During the same period, truck movements increased 19 percent.

The board produces and distributes electrical energy. Its steam generators were designed to burn pulverized bituminous coal of the type mined in southeastern Kansas, and it uses approximately 25 percent of all coal shipped by Kansas producers. It also consumes natural gas, and interstate coal of admitted inferior quality, to produce electrical energy. In 1959, 52 percent of the energy produced was derived from coal and 48 percent from gas. In that year, 150,000 tons of coal from Kansas origins were consumed, and 69,000 tons from the interstate origins of Clinton and Berrier, Mo. The rate on coal from Kansas origins is $1.98, and from those Missouri origins it is $1.62. The higher quality of Kansas coal favors its use, but further increases in rates would cause this utility to expand its use of interstate coal and natural gas.

In the prior Kansas proceeding 305 I.C.C. 335, we refused to grant the increases there sought, stating:

Any substantial increase in revenue from coal rates increased as sought is questionable in view of the declining production in Kansas and the expanding use of competitive fuels.

The present record justifies the same conclusion.

Petroleum and petroleum products.—The interstate rates on refined petroleum products, in tank cars and in packages, were prescribed in *Refined Petroleum Products in the Southwest*, 171 I.C.C. 381, as well as rates on low-grade petroleum products, including crude oil, in tank cars and

packages, made 80 percent of those prescribed on gasoline. The present interstate rates on refined and low-grade petroleum products, in packages, except as hereinafter noted, are on the prescribed basis. For example, for a distance of 350 miles, the present interstate rates are 69 cents on refined products and 55.5 cents on low-grade products. The corresponding intrastate rates are 61 and 49 cents. The proposed increases would produce intrastate rates on the same level as the interstate rates.

On refined and low-grade products in tank cars, except asphalt and liquefied petroleum products, a truck-competitive scale of rates has been established on both interstate and intrastate movements. The present intrastate rate, for example, for a distance of 350 miles, is 43 cents. To raise the intrastate level to the interstate level of rates, the respondents propose to apply 5 percent of the 12-percent increase authorized in Ex Parte No. 206 and the 1-cent increase (except on gasoline) authorized in Ex Parte No. 212. For the distance of 350 miles, the intrastate rate would then be 45 cents for gasoline and 46 cents for all other commodities, or the same as the interstate rates on those commodities for the same distance.

On asphalt in tank cars, a reduced scale of rates for both interstate and intrastate application has been established. The scale is largely comparable to the truck-competitive scale of rates applicable on refined and low-grade products, although it is higher for distances up to 180 miles, the same for distances between 180 and 200 miles, and less for the longer distances. To bring the intrastate level up to the interstate rates, application of the 1-cent increase author-

ized in Ex Parte No. 212 only is sought. The present intrastate rate of 38 cents for a distance of 350 miles would then be 39 cents, or the same as the interstate rate.

A reduced scale of rates applies on petroleum crude oil, petroleum oil residuum, and other petroleum oils. The scale was designed to meet pipeline and truck competition, and is lower than the truck-competitive scale of rates above referred to. The present joint-line intrastate rate from Phillipsburg to Coffeyville, for example, a distance of 351 miles, is 21 cents, and increased as proposed it would be 25 cents, the same as the corresponding interstate rate.

Reasonable maximum interstate rates on refined petroleum products in packages to the Kansas City, Mo.-Kans., area from Kansas and Oklahoma origins were prescribed in *Midcontinent Oil Rates, 1925*, 112 I.C.C. 421. To meet pipeline competition, the rates established following the decision were lower than those prescribed. The present intrastate rate from Kansas group 2 origins (for example, Wichita) to Kansas City is 35 cents, and the interstate rate from the same origin to Kansas City, Mo., is 40 cents. The intrastate rate increased as proposed would be the same as the interstate rate.

The interstate rates on refined oil in tank cars, except liquefied petroleum gas, from Kansas group 2 and Oklahoma group 3 points to the Kansas City, Mo.-Kans., area were prescribed in *Petroleum Rail Shippers' Assn. v. Alton & S.R.*, 243 I.C.C. 589. The present intrastate rate from Kansas group 2 to Kansas City is 27 cents, and increased as proposed it would be 31 cents, the same as the interstate rate from the same origins to Kansas City, Mo.,

and lower than the corresponding rate on the prescribed level.

On liquefied petroleum gas in tank cars, only the Ex Parte No. 206 increase is sought on intrastate movements to Kansas City. The rates from Kansas group 2 and Oklahoma group 3 origins to the Kansas City, Mo.-Kans., area were prescribed in *Montana-Dakota Utilities Co. v. Atchison, T. & S.F. Ry. Co.*, 268 I.C.C. 769. The present intrastate rate from Kansas group 2 to Kansas City is 30 cents, and increased as proposed (12 percent as authorized in Ex Parte No. 206), it would be the same as the interstate rate of 34 cents or Kansas City, Mo., and lower than the corresponding rate on the prescribed basis.

The proposed increases on certain of these commodities is opposed by two producers, each with a refinery at El Dorado, and others at different points. These refineries are served by both truck and rail, and the producers contend that an increase in intrastate rates would divert the present rail movement to trucks and fail to result in increased revenues.

One of the producers specifically opposes the increases on asphalt and residual fuel oil. In 1957, it shipped 92.7 percent of its asphalt intrastate traffic by truck and 7.3 percent by rail, and in 1959, 94 percent by truck and 6 percent by rail. Although the percentage declined, the number of shipments by railroad increased. The producer attributes that increase to reductions in intrastate rates effective March 1, 1958, and September 12, 1959. An additional factor, however, was greater production. In 1959, the same producer shipped 18 percent of its residual fuel

oil production by rail, or 176 tank-car loads, and 82 percent by truck.

The other shipper opposes the increases in the intrastate rates on tank-car shipments of gasoline and other petroleum products taking the same rates, such as fuel oil distillates, and liquefied petroleum gas and asphalt. On those commodities, the rail and truck rates have been maintained approximately on the same level. With the proposed increases, the intrastate rail rates generally will exceed the corresponding truck rates.

Approximately 15 years ago, this company shipped practically 100 percent of its production of liquefied petroleum gas by rail. During the months of September, October, and November 1959, 76.7 percent of its intrastate movement was by truck, and 23.3 percent by rail. The present truck rates are lower than the rail rates for distances up to 225 miles, and higher for the longer distances. The railroads are handling this traffic for the longer hauls. If the rates are increased as proposed, the rail rates will continue to be higher for the shorter distances and lower for the longer distances, although the spread in the latter instance would be narrowed.

There has been a steady diversion of the company's asphalt traffic from rails to trucks. In 1952, of a total intrastate movement of 8,922,052 gallons, 65.4 percent moved by rail and 34.6 percent by truck; in 1959, of a total production of 12,812,037 gallons, only 7.3 percent moved intrastate by rail. Although an increase in the rail asphalt rates would narrow the spread, the rail rates would remain lower for corresponding distances. Truck service has cer-

tain advantages for which the company is willing to pay higher rates, and with the narrowing of the spread in the rail and truck rates, it contends that an increased movement by truck can be anticipated.

There is a large movement of petroleum and petroleum products in Kansas. In September 1959, 6 of the respondents terminated 779 intrastate carloads and 993 interstate carloads. As a previous table shows, in 1958 those commodities accounted for 5.5 percent of the total carload traffic originated by major railroads in Kansas. To the extent that traffic, formerly moved by rail, presently moves by truck, it is not conclusively established that increased rates are the sole, or even the principal, reason for the shift.

General discussion.—The increases authorized in Ex Parte Nos. 206 and 212 were predicated upon the needs of the railroads generally, including the respondents herein, for additional revenue to meet increased operating expenses. Those expenses are not confined to interstate operations, but are incurred in connection with both interstate and intrastate transportation. Kansas intrastate traffic should make a revenue contribution to those operating expenses more nearly proportionate to the contribution made by such traffic prior to the increases authorized in the specified ex parte proceedings. *Missouri Intrastate Freight Rates and Charges,* 289 I.C.C. 733.

In general, the instant petition is supported by a clear showing that the respondents are in need of additional revenue, and that the intrastate rates on the considered commodities are lower than the interstate rates on the

same commodities. Also, the respondents have established that the interstate rates are not in excess of reasonable maximum rates, and that intrastate operating conditions incident to the transportation of the considered traffic in Kansas are no more favorable than those incident to interstate transportation of like traffic to, from, and through points in Kansas.

The remaining issue is whether the considered commodities can sustain the proposed intrastate increases and thus provide substantial additional revenue. The informed judgment of the respondents' traffic officials on this issue is entitled to considerable weight. *United States v. Louisiana*, 290 U.S. 70; *State of South Carolina v. United States*, 136 F. Supp. 897, affirmed, 351 U.S. 944; and *State of Alabama v. United States*, 141 F. Supp. 488. Their statements that a net gain in revenue will result are supported by data showing that revenues generally have increased following the application of authorized rate increases. We have considered the evidence of the protestants that diversion of traffic in certain commodities will occur. Except on refractories and related articles, and on bituminous coal we conclude from all the evidence that the increases sought will result in a substantial increase in the respondents' revenues. The failure of such traffic to bear its fair proportionate share of the increased operating expenses by providing additional revenues commensurate with those now provided by interstate traffic unduly discriminates against, and places an undue burden on, interstate or foreign commerce. With respect to bituminous coal, in view of the evidence previously discussed, we cannot find

that increased revenues would result from increased rates on that commodity. In the absence of any evidence of intrastate movements of refractories and related articles, the essential finding that an increase in the intrastate rates on these commodities would result in increased revenue cannot be supported. *Nebraska Intrastate Freight Rates and Charges*, 287 I.C.C. 445.

Ultimate findings and conclusions.—We find that:

1. The conditions incident to the intrastate transportation within Kansas of crushed stone, sand, gravel, road aggregates, chat, and agricultural limestone; clay drain-tile, clay sewer pipe, and related articles; lightweight building aggregates, including expanded clay or shale cinders; hay; and petroleum and petroleum products are no more favorable than those incident to the interstate transportation of like traffic to, from, and through points in Kansas.

2. The amounts and percentages by which interstate freight rates and charges on the commodities named in finding 1 between points in Kansas and points in adjoining States were increased, as authorized in Ex Parte Nos. 206 and 212, are just and reasonable.

3. The present Kansas intrastate freight rates on the commodities named in finding 1, imposed by authority of the State, are abnormally low, and are not contributing their fair share of the revenues required by the respondents to enable them, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, thereby accomplishing the

purposes of the Interstate Commerce Act, as set forth in the national transportation policy declared by the Congress, to develop and preserve a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense.

4. The burden thus cast upon interstate commerce is undue in and to the extent that those intrastate rates and charges are less than they would be on the bases herein approved; and such intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against, and an undue burden on, interstate commerce.

5. The unlawfulness herein found to exist should be removed by applying to the Kansas intrastate rates and charges, on the commodities described in finding 1, the same respective increases as are maintained by the respondents on like interstate traffic between points in Kansas and points in adjoining States, as authorized in Ex-Parte Nos. 206 and 212, provided that increases may not be made in intrastate rates to levels higher than the interstate rates on like traffic to, from, or through points in Kansas, for like or greater short-line distances over the same lines of railroad.

6. The establishment of increases in rates and charges as provided in finding 5 will not result in unreasonable rates or charges, nor in rates or charges that are unreasonable in relation to interstate rates or charges, and will increase the revenues of the respondents by substantial amounts.

7. The present intrastate rates on bituminous coal, and on refractories and related articles, are not shown to cause undue or unreasonable, advantage, preference, or prejudice, or undue, unreasonable, or unjust discrimination against, or an undue burden on, interstate or foreign commerce.

The foregoing ultimate findings are made without prejudice to the right of the authorities of the State of Kansas, or any interested party, to apply for modification thereof, as to any individual intrastate rate or charge affected thereby, on the ground that such rate or charge is not related to the interstate rates and charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.

An order effectuating the foregoing findings and conclusions will be entered, unless we are notified by the Kansas commission, within 30 days from the date of the service of this report, that it will permit the increases herein approved to take effect.

VICE CHAIRMAN MURPHY, with whom COMMISSIONER GOFF joins dissenting in part:

I would disapprove the increases on crushed stone, sand, gravel, road aggregates, including chat, and gasoline and petroleum products taking the same rates. In my opinion any further increase in the rates on the above commodities will adversely affect the movement of this traffic to such an extent that traffic losses will more than offset any revenue gains.

COMMISSIONER FREAS, dissenting in part:

I disagree with the conclusions of the majority to the extent that increases are prescribed on commodities other than lightweight building aggregates, including expanded clay or shale cinders.

COMMISSIONER WALRATH dissenting in part:

I would affirm the findings of the hearing examiner which are, in my opinion, supported by the evidence of record.

COMMISSIONER MCPHERSON did not participate.

APPENDIX A

Authorized interstate increases

EX PARTE NO. 206

Commodity	Increase
Crushed stone, sand, gravel; chat; and agricultural limestone	12 percent.
Clay draintile, clay sewer pipe, and related articles	12 percent.
Building aggregates, including expanded clay or shale cinders	12 percent.
Refractories and related articles	12 percent.
Bituminous coal	15 cents per net ton.
Petroleum and petroleum products	12 percent.

EX PARTE No. 212

Commodity	Increase
Crushed stone; sand; gravel; road aggregates; chat; and agricultural limestone	3 percent, maximum 12 cents per net ton.
Clay draintile and related articles	2 cents per 100 pounds.
Clay sewer pipe and related articles	5 cents per 100 pounds.
Building aggregates, lightweight	3 percent, maximum 12 cents per net ton.
Refractories and related articles	1 cent per 100 pounds.
Bituminous coal	10 cents per net ton.
Petroleum and petroleum products, except gasoline, liquefied petroleum gas, butane, and propane gas	1 cent per 100 pounds.
Hay	5 cents per 100 pounds.

APPENDIX B[1]

KANSAS INTRASTATE FREIGHT RATES AND CHARGES

Part I[2]

Period	Gross property investment	Net property[3] investment	Operating revenues	Net railway operating income	Operating ratio	Return on net property investment
					Percent	*Percent*
Year 1952	$6,392,949,197	$5,042,325,887	$2,197,163,598	$232,570,964	72.75	4.61
Year 1953	6,547,791,828	5,178,202,743	2,207,010,028	227,278,224	74.20	4.39
Year 1954	6,681,155,349	5,279,569,729	1,962,798,312	202,530,191	76.04	3.84
Year 1955	6,803,597,174	5,356,159,561	2,062,419,526	230,568,673	74.00	4.30
Year 1956	6,809,296,285	5,321,532,461	2,113,236,043	220,162,667	75.31	4.14
Year 1957	7,044,043,958	5,471,930,141	2,126,891,390	187,758,938	76.74	3.43

See footnotes below.

Part II[4]

Period	Gross property investment	Net property[3] investment	Operating revenues	Net railway operating income	Operating ratio	Return on net property investment
					Percent	*Percent*
Year 1958		$5,480,154,588	$2,076,058,053	$201,708,819	75.38	3.68
Year 1959		5,478,880,106	2,100,551,504	184,640,212	75.80	3.37
Month of January 1959			170,149,512	12,212,687	78.32	
Month of January 1960			163,090,031	9,462,944	80.06	

[1] Railroads represented—AT&SF, CB&Q, CRI&P, KCS, M-K-T, MoPac, STL-SF, and UPac.
[2] Information in part I similar to that presented to Commission in Ex Parte Nos. 206 and 212.
[3] Expanded to show partially for period subsequent to hearings in Ex Parte Nos. 206 and 212 similar information to that shown in part I.
[4] The net property investment shown represents the average of the accounts at the beginning and end of the year, except for 1959, which represents the investment at the beginning of the year.

APPENDIX E

INTERSTATE COMMERCE COMMISSION
Served NOVEMBER 30, 1960
NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the recommended report will become the report of the Commission and will become effective unless exceptions are filed seasonably or the report is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 30 days after the final date for filing exceptions. The stated specific time periods apply to all parties and give full effect to Rule 1.21(c) of the General Rules of Practice to the extent, if any, the provisions of such rule otherwise would be applicable to this proceeding. It should not be assumed that the recommended report has become effective as the report of the Commission, until a notice to that effect, signed by the Secretary, has been served.

DOCKET No. 33239

KANSAS INTRASTATE FREIGHT RATES AND CHARGES

Decided ———————

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1. Kansas intrastate rates on agricultural limestone; clay drain tile, clay sewer pipe and related articles; lightweight building aggregates, including expanded clay or shale cinders; hay; and petroleum and petroleum products, except gasoline and petroleum products taking the same rates, found to cause unjust discrimination against, and undue burden on, interstate commerce.
2. Kansas intrastate rates on expanded clay or shale cinders found to cause undue and unreasonable advantage, preference, and prejudice as between persons in intrastate commerce and persons in interstate commerce.
3. Kansas intrastate rates on crushed stone, sand, gravel, and road aggregates, including chat; refractories and related articles; bituminous coal; and gasoline and petroleum products taking the same rates, found not shown to cause undue and unreasonable advantage, preference, or prejudice, nor unjust discrimination against, or undue burden on, interstate or foreign commerce.
4. Basis for removal of unlawfulness found to exist, prescribed.

Monroe E. Clinton, Ernest D. Grinnell, Jr., William P. Higgins, Don DeVitt, Toll R. Ware, and *Harvey Huston for* the respondents.

M. G. Johnson for intervener in support of the respondents.

Byron M. Gray and *I. M. Herndon* for the State Corporation Commission of Kansas, protestant.

Joseph H. McDowell for the Board of Public Utilities of Kansas City, Kansas, protestant.

Donald R. Wigton, A. B. Hamilton, James F. Miller, H. J. Goudelock, C. A. Hallberg, Willard Dunn, and *E. J. Robinett* for other protestants.

RECOMMENDED REPORT BY J. T. FITTIPALDI, HEARING EXAMINER

This proceeding is an investigation under section 13 of the Interstate Commerce Act concerning the lawfulness of the intrastate freight rates and charges[1] in the State of Kansas. Responsive to a petition filed on October 26, 1959, by the principal railroads[2] serving Kansas, the Commission entered upon this investigation for the purpose of determining whether the rates and charges of the com-

[1] Rates, charges, increases in rates, and rate differences are stated in amounts per 100 pounds, except as otherwise indicated.

[2] The Atchison, Topeka & Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Garden City Western Railway Company; The Kansas City Southern Railway Company; Kansas City Terminal Railway Company; Kansas, Oklahoma & Gulf Railway Company; Midland Valley Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Northeast Oklahoma Railroad Company; St. Louis-San Francisco Railway Company; and Union Pacific Railroad Company. These Carriers will be referred to as respondents, or sometimes by their short titles.

mon carriers by railroad operating in Kansas, or any of them, for the intrastate transportation of certain commodities, hereinafter referred to, made or imposed by the authority of the State of Kansas, cause or will cause, by reason of the failure of such rates and charges to include increases corresponding to those permitted by this Commission for interstate traffic in certain proceedings,[3] any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce. It is also the purpose of the investigation to determine what rates and charges, or what maximum or minimum, or maximum and minimum rates and charges shall be prescribed to remove any unlawfulness found to exist.

All common carriers by railroad, operating in Kansas and subject to the jurisdiction of this Commission, were made respondents. Copies of the order of investigation and notice of hearing were served upon each of them and upon the State of Kansas, and State Corporation Commission of Kansas, hereinafter referred to as the Kansas Commission.

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[3] *Increased Freight Rates, E. and W. Territories, 1956*, 299, ICC 429, and *Increased Freight Rates, E., W., and S. Territories, 1956*, 300 ICC 633; and *Increased Freight Rates, 1958*, 302 ICC 665; and 304 ICC 289; referred to hereinafter as Ex Parte No. 206 and Ex Parte No. 212, respectively.

A shipper of volcanic scoria from Twin Mountain, N. Mex., appeared in support of the respondents' petition. Representatives of the Kansas Commission, the Board of Public Utilities of Kansas City, Kansas[4], as well as numerous shippers and shipper organizations, appeared in opposition to the petition of the respondents, and are generally referred to herein as the protestants.

In the initial decision in Ex Parte No. 206, decided December 17, 1956, this Commission authorized, pending further hearing, an interim general increase, as is pertinent, of 5 percent, with exceptions, in the interstate railroad rates and charges in Western Territory within which the State of Kansas is included. After further hearing, in the final decision in Ex Parte No. 206, decided August 6, 1957, a general increase in the interstate railroad rates and charges of 12 percent, with exceptions was authorized within Western Territory in lieu of the interim increase previously authorized.

By application filed with the Kansas Commission, on December 28, 1956, the respondents sought increases in the Kansas intrastate rates and charges similar to the increases authorized by this Commission in its initial report in Ex Parte No. 206, and, on April 30, 1957, by supplemental application filed with that Commission, the respondents sought the increases authorized by this Commission in its final decision in Ex Parte No. 206. By report and order of April 23, 1958, and supplemental order

[4] All points named are in Kansas unless othewise indicated.

of June 2, 1958, the Kansas Commission authorized increases in the intrastate rates and charges corresponding to the increases authorized in Ex Parte No. 206 on interstate traffic, except no increases were authorized in the intrastate rates and charges on carload shipments of sand; gravel; crushed stone, including chat; building aggregates, including expanded clay or shale cinders; agricultural limestone; brick, clay sewer pipe, clay drain tile and related articles; bituminous coal; petroleum and petroleum products, including liquefied petroleum gas; and cement.

In the initial decision in Ex Parte No. 212, decided February 11, 1958, this Commission considered the schedules of the railroads proposed increases, of varying amounts, in certain interstate rates and charges. The Commission, among other things, suspended some schedules, permitted others to become effective, and instituted an investigation into the lawfulness of all of the schedules. After further hearing, in the final decision in Ex Parte No. 212, decided September 9, 1958, this Commission authorized certain increases in the interstate railroad rates and charges.

On January 12, 1959, the respondents filed an application with the Kansas Commission seeking increases in the Kansas intrastate rates and charges similar to those increases authorized in Ex Parte No. 212. By report and order of April 22, 1959, the Kansas Commission authorized increases in the intrastate rates and charges corresponding to the increases authorized by this Commission on interstate traffic in Ex Parte No. 212, except no increases were authorized in the intrastate rates and charges on carload shipments of sand; gravel; crushed stone; chat; road ag-

gregates; lightweight building aggregates; agricultural limestone; brick; clay sewer pipe, clay drain tile and related articles; bituminous coal; petroleum and petroleum products; and hay.

In this proceeding, except as hereinafter noted, the respondents seek to increase the Kansas intrastate rates and charges to the extent that the interstate rates and charges were increased on like traffic as a result of the authorizations in Ex Parte Nos. 206 and 212, and to the extent that the application of such increases were declined for intrastate application by the Kansas Commission.

By schedules filed with this Commission, subsequent to the institution of the instant investigation, the respondents proposed to adjust the interstate level of rates on brick and related articles, except, for example, fire brick, clay sewer pipe and clay drain tile.[5] By application filed January 29, 1960, with the Kansas Commission, the respondents sought to establish the same basis of rates on the intrastate movements of brick and related articles, except as noted, and, by order dated February 9, 1960, the application was granted by that Commission. The rates became effective on March 11, 1960, on interstate and intrastate movements. Accordingly, the intrastate rates and charges on brick and related articles, to the extent noted, will not be further considered herein.

By schedules filed with this Commission, also subsequent to the institution of the investigation, the respondents proposed to adjust their interstate level of rates on cement.

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[5] Articles listed in items 470, 475 and 480, Western Trunk Line Committee, agent, tariff ICC No. A-4221.

By application, dated February 11, 1960, as supplemented on February 12, 1960, the respondents sought authority from the Kansas Commission to establish the proposed interstate level of rates on the intrastate movements of cement. By order dated Februray 16, 1960, the Kansas Commission granted the application. Since neither adjustment had become effective at the time of the hearing herein, by agreement of the parties at the hearing, the respondents were to notify this Commission, as well as all parties of record, if the proposed adjustments had become effective, and if not, whether the increases originally sought on cement were to remain in issue. By letter dated March 29, 1960, the respondents stated that the interstate and intrastate adjustments had become effective on March 27, 1960, and therefore, the intrastate rates and charges on cement will not be further considered herein.

The amounts of the increases authorized in the rates and charges on the interstate movement of the commodities here in issue in Ex Parte Nos. 206 and 212 are shown in Appendix A and B, respectively.

Contentions of the parties—The respondents maintain that they are in need of additional revenues so as to enable them to maintain, in the public interest, an adequate and efficient railroad transporation service at the lowest cost consistent with the furnishing of such service; and that there are no special circumstances which warrant the maintenance of intrastate rates and charges on the Kansas traffic in issue on a relatively lower level than the interstate rates and charges on like traffic moving to, from, and through points in Kansas for the same or comparable

distances. Therefore, the respondents contend, (1) that the disparity in the intrastate and interstate rates caused by the failure of the Kansas Commission to permit the intrastate rates to be increased to the extent that the interstate rates were increased on like traffic as a result of the decisions in Ex Parte Nos. 206 and 212 causes, and will continue to cause, interstate shippers and localities, particularly the shipper of volcanic scoria from Twin Mountain, N. Mex., to be unduly prejudiced, and the intrastate shippers and localities, particularly the shipper of expanded clay or shale cinders at Ottawa, to be unduly preferred, and constitutes, and will continue to constitute, a potential source of discrimination against interstate commerce, and (2) since the general increases authorized in Ex Parte Nos. 206 and 212, to the extent applied to the interstate rates on like traffic, when applied to the Kansas intrastate traffic here in issue, will produce additional revenue so that the contribution therefrom to the respondents' expenses will be more nearly proportionate to the contribution theretofore made by the same traffic prior to the increases authorized in the interstate rates, the intrastate traffic involved, to the extent it does not presently provide such contribution, causes, and will continue to cause, unjust discrimination against, and an undue burden on, interstate or foreign commerce.

The Kansas Commission, citing the decision in *Mississippi Public Service Commission v. U. S.*, 349 U. S. 908, wherein it was held that intrastate transportation is primarily the concern of the state, and that before this Com-

mission can nullify the action of the state, the need for exercising Federal Power must clearly appear, contends that the evidence of record fails to show that such interference would be justified. Particularly, the Kansas Commission contends that the mere disparity in the intrastate and interstate rates on like traffic, as shown by the respondents, is insufficient to justify a finding that the intrastate rates on the traffic in issue, cause, and will continue to cause, unjust discrimination against, or an undue burden on, interstate commerce, and unreasonable disadvantage and prejudice to interstate shippers or localities.

Generally, The Board of Public Utilities of Kansas City and the other protestants take the position that an increase in the intrastate rates on certain of the commodities in issue will not result in substantially increasing the respondents' revenues.

Exceptions to examiner's rulings.—In support of their contention that the sought increases will substantially increase their revenues, eight of the respondents[6] serving Kansas, hereinafter referred to as the major class I railroads, show that although the total number of tons of all traffic transported over their lines decreased approximately three percent between 1946 and 1958, during which period several general increases were applied to the in-

[6] The Atchison, Topeka and Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Kansas City Southern Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; St. Louis - San Francisco Railway Company; and Union Pacific Railroad Company.

terstate and intrastate rates and charges, their gross freight revenues increased 51.05 percent. Certain of the respondents made similar individual showings. In addition, the major class I railroads show that, during the same period, 1946 and 1958, although the total number of tons of traffic transported over their lines to, from, through, and within points in Kansas decreased approximately three percent, the net freight revenues, gross freight revenues less switching and pick-up and delivery absorptions, increased 56.44 percent. Predicated upon the foregoing evidence, certain of the traffic representatives of the respondents stated that an increase in the intrastate rates on the commodities involved would result in increased revenues. The objection of the protestants, to similar conclusions attempted to be drawn by two additional witnesses testifying on behalf of the respondents from evidence substantially similar in nature to that referred to above, was sustained on the ground, advanced by the protestants, that the witnesses did not evaluate the effect of the increases on the movements of the specific commodities here in issue. The respondents made an offer of proof regarding the excluding testimony, and for such purpose, the witnesses stated that the increases sought would result in increased revenues.

In support of their position that the evidence was improperly excluded, the respondents, on brief, rely on the decision in *South Carolina v. United States*, 136 F. Supp. 897, affirmed 351 U. S. 944, wherein the court stated:

> Whether experience with interstate rates is a dependable guide in judging the effect of a corresponding increase in intrastate rates is a matter of expert

judgment as to which the opinion of the railroad traffic experts is certainly substantial evidence of real value, as their railroads will bear the loss if the increases of rates which they proposed results in a decrease of revenue. Certainly their opinion is entitled to as much weight as prophecies of traffic loss by interested shippers who have everything to gain, and nothing to lose by holding intrastate rates at the existing level. At all events, we cannot say that the evidence upon which the Commission acted, which consisted not only of the testimony of these experts but also of the traffic studies upon which it was based, was not substantial evidence.

In view of the foregoing pronouncement by the court, the protestants' objection is overruled and the evidence submitted as an offer of proof will be considered in disposing of the issues.

At the hearing, the Kansas Commission offered in evidence, as an exhibit, which had been marked for identification, a copy of the transcript of the testimony of two witnesses. The witnesses had testified in the Kansas Commission's proceeding wherein the same respondents herein sought authority to increase the intrastate rates on hay to the extent authorized in Ex Parte No. 212. The witnesses were cross-examined in the proceeding by the attorney representing the respondents in the instant proceeding. The respondents objected to the receipt in evidence of the exhibit on the grounds that the witnesses were not available for cross-examination, the testimony had been given approximately one year previously, and the exhibit represented the testimony given in another proceeding before another forum. The objection was sustained, and the

exhibit was not received in evidence. On brief, the Kansas Commission requests that the exhibit be admitted in evidence and considered in disposing of the issues. Since the failure of the witnesses to appear at the hearing herein was not explained, the respondents' objection is sustained.

The evidence of record relating to the volume of traffic and revenues; the revenue needs of the respondents; the relative transportation conditions, interstate and intrastate; and the evidence relating to the specific commodities in issue will be considered in the order named hereinafter.

Volume of traffic and annual revenues.—In order to establish the importance of the traffic under consideration, the major class I railroads show the total number of tons of certain of the commodities here involved originated by them in 1958 in Kansas, for both intrastate and interstate movement, together with the percentage which each commodity bears to the total tonnage of all carload traffic originated in Kansas in that year, as follows:

Commodity	Tons Originated	Percent of total carload traffic
Hay	26,493	0.11
Bituminous coal	965,458	4.16
Gravel and sand, N.O.S.	572,502	2.47
Stone and rock: broken, ground, and crushed	1,407,964	6.07
Petroleum and petroleum products	1,278,932	5.51
Sewer pipe and clay drain tile (not metal)	10,025	0.04
TOTAL	4,261,374	18.36
Total carload traffic	23,208,141	100.00

The following table, compiled from the data of six of the respondents[7] for the month of September 1959, shows

Commodity	Number of carloads	
	Intrastate	Interstate
Agricultural limestone[8]	88	20
Bituminous coal	665	242
Brick and related articles[9]	--10	13
Building aggregates	16	9
Chat	332	101
Clay sewer pipe, clay drain tile, and related articles	4	8
Crushed stone[10]	1,281	362
Expanded clay and shale cinders	53	2
Gravel	97	2
Hay	18	4
Petroleum and petroleum products	779	993
Road aggregates	3	2
Sand	190	30

[7] The railroads listed in footnote 6 excluding the Chicago, Burlington & Quincy Railroad Company and The Kansas City Southern Railway Company.
the number of carloads of the commodities in issue, intrastate and interstate, that were terminated in Kansas:

[8] The respondents believe that some shipments of agricultural limestone were billed as crushed stone, and, for that reason, the agricultural limestone terminations are understated and the crushed stone terminations are overstated.

[9] Includes only refractories such as fire brick listed in item 470, and other refractories listed in items 475 and 480, Western Trunk Line Committee, agent, tariff I.C.C. No. A-4221.

[10] There were no intrastate movements of refractories and related articles.

The following table, based upon the data of seven of the respondents[11] for the months of August and November 1958, and February and May 1959, projected to an annual basis, shows, tor 1959, for each group of the considered commodities, the estimated number of intrastate carload shipments, the estimated intrastate tonnage, the total applicable freight charges at the present rates, the total applicable freight charges with the increases here sought, and difference in revenues, assuming no diversion of, or increase in, traffic:

Commodity	Carloads terminated	Tons terminated	Freight Revenue at present rates	Freight revenue with increases sought	Revenue differences
Sand	3,732	$249,736	$312,813	$358,155	$45,342
Gravel	2,562	172,869	208,140	240,750	32,610
Crushed stone including chat	27,423	1,813,683	3,198,963	3,707,253	508,290
Road and building aggregates	24	1,695	1,614	1,860	246
Lightweight building aggregates, i.e., expanding clay or shale cinders	525	39,054	99,384	114,570	15,188
Agricultural limestone	507	34,071	44,328	56,463	12,135
Clay sewer pipe, clay drain tile and related articles	195	4,866	15,996	21,645	5,649
Bituminous coal	3,756	222,696	428,511	461,083	32,572
Petroleum and petroleum products	4,677	132,273	580,989	673,533	95,544
Hay	69	1,392	7,656	9,048	1,392
TOTAL	43,470	2,672,024	$4,898,394	$5,644,360	$745,966

Respondents' revenue needs.—The major class I railroads serving Kansas made a detailed group showing of their property investment and income accounts, the increases in costs of materials, supplies, and labor, the percentage rates of return on property investments, operating

[11] The railroads listed in footnote 6 excluding the Kansas City Southern Railway Company.

ratios, and increased operating efficiency. Some of the respondents made substantially similar showings on an individual basis, and some of them also showed their individual capital expenditures made for modernization, and, the increases in Federal and local taxes experienced by them. Certain of this evidence, generally, for the years 1952 through 1957, is similar in large measure to that presented to this Commission in Ex Parte Nos. 206 or 212, upon which evidence the respondents principally rely here. However, the major class I railroads have expanded that showing to include similar information for periods subsequent to the hearings in Ex Parte Nos. 206 and 212. The respondents which made individual presentations expanded their showings similarly. Since much of the evidence is largely a repetition of that previously considered by this Commission, except as noted, the evidence will be restated only to the extent necessary to reflect the respondents' basis for its alleged need of increased revenues.

The gross property investment of the major class I railroads in road and equipment used used in transportation service, together with cash, materials, and supplies, totaled $6,392,949,197 and $7,044,043,958 in 1952 and 1957, respectively. The net property investment,[12] gross investment less recorded depreciation and amortization, was $5,042,325,887 in 1952 and $5,471,930,141 in 1957. In 1958 and 1959, the net property investment totaled $5,480,154,588

[12] The net property investment shown represents the average of the accounts at the beginning and end of the year, except for 1959, which represents the investment at the beginning of the year.

and $5,478,880,106, respectively. The percentage rates of return on net property investment were 4.61 in 1952, 3.43 in 1957, 3.68 in 1958, 3.37 in 1959.

In 1962, 1953, 1954 and 1957, the operating revenues of the major class I railroads totaled $2,197,163,598, $2,207,010,028, $1,962,788,312, and $2,126,891,390, respectively. In 1958 and 1959, the operating revenues were $2,076,058,053 and $2,160,551,504, respectively. For the months of January 1959 and 1960, the operating revenues were $170,149,512 and $163,090,031, respectively. The net railway operating income in 1952, 1953, 1954, and 1957 totaled $232,570,964, $227,278,224, $202,530,191, and $187,758,938, respectively. In 1958, it was $201,708,819 and $184,640,212 and 1959. For the months of January 1959 and 1960, the net railway operating income was $12,212,687 and $9,462,944, respectively. The percentage operating ratios of these carriers as a group were 72.75 in 1952, 76.04 in 1954, 76.74 in 1957, 75.38 in 1958, 75.80 in 1959, and 78.23 and 80.06 for the months of January 1959 and 1960, respectively.

More than 80 percent of the operating expenses of the major class I railroads is comprised of wages and salaries, and materials and supplies. The former represents approximately 60 percent of such expenses. In 1952, the major class I railroads serving Kansas had an average of 237,338 employees, and in 1957, 192,726 employees. The total compensation paid to them was $1,033,929,495 in 1957, as compared to $1,024,072,987 in 1952. The total straight-time hourly compensation for the years 1952 and 1957 was $917,588,686 and $916,096,336, respectively, and

the corresponding average straight-time hourly rates of compensation were $1.824 and $2.251. The average straight-time hourly rate increased from $1.824 in 1952 to $2.338 as of November 1, 1957, or 128.13 percent. The average straight-time hourly rate of compensation increased to $2.448, as of November 1959, or 136.40 percent over the 1952 level.

Materials and supplies, including fuel, coal and oil, used in producing transportation service, constitute approximately 20 percent of the operating expenses. Comparing the period of January 1952, with that of January 1958, using the year 1952 as a value of 100, the major class I railroads show that the average unit prices of materials and supplies, other than fuel, and fuel, in the Western District, increased 22.5 and 8.7 percent, respectively, and the weighted-average price of all materials and supplies and fuel increased 17.5 percent during the same period. As of January 1960, the average unit prices of railway materials and supplies other than fuel, and fuel, were 27.9 and 5.9 percent higher, and the weighted-average price of materials and supplies and fuel was 20.6 percent higher, than the corresponding prices in January 1952.

In addition to increases in operating expenses, inflation and higher Federal taxes have affected the respondents' financial condition. As an example, the Santa Fe shows the effect of these factors in purchasing a new car for one retired in the period 1946 and 1958. During that period 30,416 new freight cars were purchased and 23,022 were retired. The average cost of a new car was $7,350, and the

depreciated value of each car retired was $2,000. The purchase of a new car entailed an expenditure of $5,350. In order to obtain the amount necessary for the purchase of the new car, the respondent had to earn $11,146, before taxes.

There has been a continuous improvement in the operating efficiency of the major class I railroads serving Kansas. This has materially aided them in absorbing part of the increases in transportation costs and in minimizing the impact of rising costs. Average train speeds of 20.87 miles per hour in 1952 increased to 22.43 in 1957, and were maintained at that level in 1958. The average gross ton-miles per freight train-hour of 57,084 in 1952 increased to 70,682 in 1957 and to 71,971 in 1958. The net freight ton-miles per train-hour increased from 24,373 in 1952 to 29,287 in 1957, and to 29,936 in 1958. The progress in operating efficiency made by the respondents is attributed to dieselization, and to improved plan and equipment, and methods and practices. For example, in 1958, the gross capital expenditures of the Santa Fe totaled $55,800,000, comprised of $38,600,000 for new equipment, which included 2,287 freight cars and 50 lightweight baggage cars, and $7,200,000 for improvements in roadways and structures, including the completion of a new "push button" yard. In 1959, the same respondent expended approximately $59,000,000 for improvements, $38,100,000 for new equipment and $20,900,000 for roadway and structures.

Although the major class I railroads show that their operating revenues in 1957 were higher than for any year since 1953, their net operating income for 1957 was the

lowest of any previous year. In 1959, their operating revenues were higher than those in 1957, but their net operating income in 1959 was lower than that in 1957. The rate of return for 1959 was lower than that experienced in any of the previous years. The operating ratio in 1959 was the highest of any of the previous years, except for 1954 and 1957.

Intrastate operating conditions—Intrastate and interstate traffic is intermingled in the same trains, both local and through, and all of the facilities of the railroads are used indiscriminately in the movement of each. No distinction is made in handling interstate and intrastate traffic. The preponderance of the intrastate traffic is handled in local trains, and the preponderance of the interstate traffic is handled in through trains. Although the number of crew members on through and local trains is generally the same, the crew members on a local train are paid a higher wage rate, and overtime payments are more frequent in connection with the operation of a local train than a through train. On the Missouri Pacific, a local train has an additional crew member. Generally, the tonnage transported on a local train is less than that on a through train, and on the Missouri Pacific, the tonnage on a local train is 30 to 35 percent of that on a through train. The average haul of an intrastate shipment, generally, is less than that of an interstate shipment. On the Santa Fe, the average length of haul for interstate traffic in 1959 was 247 miles and for intrastate traffic the average length of the haul was 124 miles.

Crushed stone, sand, gravel, road aggregates, chat, and agricultural limestone.—An interstate scale of rates between points in Kansas, Arkansas, Missouri and Oklahoma was prescribed by this Commission in *Rates on Sand, Gravel, and Crushed Stone*, 177 ICC 621, and, in the companion intrastate proceeding, the Kansas Commission prescribed the same scale of rates for intrastate application. Subsequently, a truck-competitive scale of rates, approximating 80 percent of the prescribed scale, was voluntarily established for application, generally, on interstate and intrastate shipments, and sometime later, a lower basis of intrastate rates, on agricultural limestone only, was established. With the exception of agricultural limestone, rates on the prescribed basis apparently apply on the intrastate and interstate movements of these commodities and, consequently, the respondents seek to increase both the intrastate prescribed and truck-competitive scales of rates.

If the intrastate basis of rates on these commodities were increased as sought, they would be no higher than the concurrently-effective interstate rates on like movements on the prescribed basis[12] or the truck-competitive basis of rates for the same distances. For example, the present joint-line intrastate rates, on the prescribed and truck-competitive bases, for a distance of 150 miles, are $2.55

[13] The interstate prescribed basis of rates include the various ex parte increases applied thereto as a result of the authorizations of this Commission in various ex parte increase proceedings, including Ex Parte Nos. 206 and 212.

and $2.12 per net ton,[14] respectively. If the intrastate rates were increases as sought, 12 percent and 3 percent (maximum 12 cents per net ton) as authorized in Ex Parte Nos. 206 and 212, respectively, the corresponding joint-line intrastate rates, on the prescribed and truck-competitive bases, would be $2.95 and $2.44 per net ton, respectively, and the same as the concurrently-effective interstate rates for the same distance.

On agricultural limestone, if the present intrastate rates were increases as sought, they would be the same as the concurrently-effective interstate rates, made on the truck-competitive basis of rates, for corresponding distances up to 150 miles, and the same or less than such rates for corresponding distances beyond 150 miles, and lower than the corresponding interstate rates predicated on the prescribed basis for the same distances. For example, the present intrastate joint-line rate for 150 miles is $2.12 per net ton, and for 250 miles, the rate is $2.50 per net ton. If increased as sought, 12 percent and 3 percent (maximum 12 cents per net ton) as authorized in Ex Parte Nos. 206 and 212, respectively, the corresponding joint-line intrastate rates would be $2.44 and $2.88 per net ton. The concurrently-effective interstate rates on the truck-competitive basis of rates are $2.44 and $3.00 per net ton for the respective distances, and the corresponding rates on the interstate prescribed basis are $2.95 and $3.88 per net ton.

Sand and gravel deposits are found in abundance throughout Kansas, and, as a result, these commodities are

[14] Net tons are stated in amounts per 2,000 pounds.

produced in substantial quantities throughout the State. Stone and agricultural limestone deposits, of the type utilized by the producers herein, are found predominately in the eastern half of Kansas. All of these commodities are heavy loading, are not susceptible to damage in transit, and require no special handling. Sand, gravel and crushed stone are used principally for road surfacing purposes, including concrete and asphalt mixes. They are also used for riprap and ballast. Agricultural limestone is used for soil treating purposes, and in certain types of bituminous surfacing.

The Consumers Sand Company and the Blue River Sand and Gravel Company, producers of sand and gravel, located at Topeka and Blue Rapids, respectively; the Thompson-Strauss Quarries, Inc., and the American Marietta Compay, producers of crushed stone, including agricultural limestone, with plants at Morris and Moline and Ottawa, respectively; and the Associated Aggregate Shippers of Kansas, a voluntary non-profit group of Kansas shippers of sand, gravel, crushed stone, and agricultural limestone, oppose the increases. These producers operate permanent types of installations in the production of the commodities, and all of the facilities have rail sidings, and truck-loading facilities.

In general, due to the abundance of the deposits of these commodities in the State of Kansas, each increase in the rail freight rates has encouraged the establishment of portable installations, so-called wayside plants, for the processing of these commodities near job-sites. The establishment of these plants has had the effect of narrowing

the marketing area of the protesting producers. None of the wayside plants has railroad sidings, and the movement of these commodities from the plants to the job-sites is by truck. Except for rare instances, when a special specification of material is required, the wayside plants can meet all of the required needs of a particular job.

In general, since 1946, the movement of these commodities by rail has decreased and movement by truck has increased. The Associated Aggregate Shippers of Kansas shows the total number of tons of sand, gravel, crushed stone, and agricultural limestone shipped in intrastate commerce by its members, the total tons shipped by railroad and truck, and the percentage of the rail and truck movement to the total movement, for the years 1954 through 1959, as follows:

YEAR	Total Tons	Rail Tons	Percent rail tons to total tons	Truck tons	Percent truck tons to total tons
1954	3,781,627	2,127,669	56.26	1,653,958	43.74
1955	4,070,604	2,242,473	55.09	1,828,131	44.91
1956	4,258,759	1,677,162	39.38	2,581,597	60.62
1957	2,609,182	859,194	32.93	1,749,988	67.07
1958	3,279,130	1,228,168	37.45	2,050,962	62.55
1959	3,103,015	1,042,127	33.58	2,060,888	66.42

The following table shows that, although the Kansas production of these commodities increased 16.31 percent in 1958 as compared to 1954, the tonnage shipped by railroad in intrastate commerce by members of the Associated Aggregate Shippers of Kansas decreased 42.28 percent in 1958 as compared to 1954.

Year	Total Kansas production	Movement by railroad
1954	15,053,609	2,127,669
1955	15,741,843	2,242,473
1956	19,421,444	1,677,162
1957	14,627,604	859,194
1958	17,509,262	1,228,168

A producer of sand and gravel aggregates, comprised of sand, gravel and rock, used principally for paving purposes, shows that between 1946 and 1959, a period of increasing rail rates, its production decreased due to its inability to compete with wayside plants, and, during the same period, its shipments by rail decreased in direct relationship to the increases in the rail rates. Between 1946 and 1950, this company produced 1,000,000 tons of sand and gravel aggregates, 77.6 percent of which moved by rail; between 1951 and 1955, its production totaled 805,000 tons, 67.8 percent of which moved by rail, and between 1956 and 1959, it produced 700,000 tons, 38.6 percent of which moved by rail. A producer of sand and gravel shows that in 1959, 6.4 percent of its production moved by rail, and 93.6 percent moved by truck. A producer of crushed limestone shows that during the period 1953-1959, it shipped, on the average, 221,035 tons by rail, but, in 1959, only 150,935 tons were shipped by rail, or only 68 percent of the average tonnage for the period. While the movement by rail declined, during the period 1953 to 1958, the production of crushed limestone by the Kansas producers increased from 8,769,000 to 12,419,000 tons.

These commodities are sold on a delivered basis. The producers maintain that in order to discourage the establishment of, or to remain competitive with, wayside plants, they were required to absorb the past increases in the rail rates by reducing their selling prices or by maintaining their prices relatively stable. A producer of sand and gravel cites the fact that subsequent to the Ex Parte No. 175, increase[15] in the intrastate rates, it was able to retain a customer which received between 250 and 300 carloads of its product by absorbing a portion of the increase. However, after the application of the Ex Parte No. 196, increase[16] in the intrastate rates, being unable to further absorb the increase, it lost the customer, except for a small number of shipments of sand and gravel aggregates processed to specification. The price of its product was reduced from 66.1 cents per net ton in 1953 to 56.29 cents per net ton in 1959. The producer of sand and gravel aggregates shows that between 1946 and 1959, the rates on its product increased to a greater extent than the selling price of the product. For example, for a distance of 100 miles, the rates in 1946 and 1959 were 88 cents and $1.59 per net ton, respectively, an increase of 80.7 percent; whereas, during the same period, the price of its product increased from 90 cents to $1.20 per net ton, or only 33-1/3 percent.

A producer of crushed limestone, usel principally in road construction, shows that, in order to remain competitive,

[15] *Increased Freight Rates, 1954*, 280 ICC 179, 281 ICC 557, 284 ICC 589, 289 ICC 395, 292 ICC 23, and 297 ICC 17.

[16] *Increased Freight Rates, 1956*, 298 ICC 279.

its price was reduced over the years from $1.46 per net ton in 1953, to $1.35 per net ton in 1959. This producer further states that it cannot absorb any further increases in the rail rates. It cites the fact that prior to the application of the Ex Parte No. 196 increase, it shipped a total of 11,207 tons of crushed limestone to Topeka. After the increase became effective on the intrastate rates, it apparently lost the business. However, after a reduction in the rail rates, which was made at its request, it was able to regain the business, and in 1959, it shipped a total of 37,232 tons of crushed limestone to Topeka. A producer of crushed stone shows that between 1954 and 1959, its price was reduced from $1.30 to $1.25½ per net ton, and, in addition, to remain competitive with the wayside plants, it has become one of the largest operators of such facilities.

These protestants maintain that any further increases in the railroad rates on these commodities will not result in increased revenues to the respondents. The Kansas Commission, in support of this position, cites the fact that the respondents have reduced their rates on crushed stone and sand below the present intrastate level in eight different instances. For example, the intrastate rate on sand from Topeka to Osawatomie has been reduced from $1.30 to $1.20 per net ton. In addition, the Kansas Commission points out that the respondents have a proposal pending to reduce their intrastate rates in Arkansas on crushed stone, gravel, riprap and sand due to, as characterized by the respondents, "The continued alarming decline in sand, gravel, crushed stone tonnage * * *" moving by railroad.

As to crushed stone, sand, gravel and chat, the respondents compare their estimated movements of 33,717 carloads for 1959, with the movements of 31,781 and 36,184 carloads predicted for 1950 in *Kansas Intrastate Freight Rates and Charges*, 286 ICC 501 and for 1956 in *Kansas Intrastate Freight Rates and Charges*, 305 ICC 335, respectively. It is the position of the respondents that the stability of the intrastate movements of these commodities since 1950, although the increases authorized in Ex Parte Nos. 168[17] and 196 were applied on the intrastate movements, as a result of the decisions in the respective-cited proceedings, indicates that the sought increases will result in increased revenues. However, it is to be noted that the Ex Parte No. 196 increase did not become effective on the intrastate movements until May 3, 1959. Therefore, the estimated movement of 33,717 carloads based on the test period of August and November 1958, and February and May 1959, does not accurately reflect the impact of the Ex Parte No. 196 increase on the movements of these commodities. Using the movement study for the month of September 1959, projected for a 12-month period, which study the respondents maintain provides an accurate estimate of the 1959 movements, only 22,800 carloads moved in 1959. This represents a decline of approximately 40 percent in the estimated movement for 1956. In addition, the impact of the increases authorized in Ex Parte No. 196 on the movement of this traffic is vividly illustrated on this record, and tends to corroborate the protestants' testimony that any

[17] *Increased Freight Rates, 1951*, 284 ICC 589, 280 ICC 179, 281 ICC 557, and 289 ICC 395.

further increase in the rail rates will adversely affect the movement of this traffic to such an extent that traffic losses will more than offset any revenue gains. As indicated, this record specifically shows that as a direct result of the application of the increases authorized in Ex Parte No. 196, the movement of 250,300 carloads of sand and gravel, and 11,207 tons of crushed limestone by rail was discontinued. Under the circumstances of this record as to crushed stone, sand, gravel, road aggregates, including chat, it is extremely unlikely that an increase in the rates on these commodities would result in increasing the respondents' revenues.

However, as to agricultural limestone, the situation as revealed by this record is quite different. Using the respondents' study for the month of September 1959, for the same reason as set forth above, the total estimated movement for the year of 1959 is approximated at 1056 carloads. This estimate is substantially in excess of the estimated movement for the year 1956 of 36 carloads predicted in 305 ICC 335, predicated upon the movements for the test month of October 1956, projected for a 12-month period. As noted, in the interim, the increase authorized in Ex Parte No. 196 was applied to such rates. It is concluded that an increase in the rates on this commodity would result in substantially increasing the respondents' revenues.

Clay drain tile, clay sewer pipe, and related articles.—A history of the rates on these commodities is set forth in *Kansas Intrastate Freight Rates and Charges*, 287 ICC 461. The disparity in the interstate and intrastate rates on these

commodities is illustrated by the following examples. On clay drain tile, the present intrastate rate from Humbolt to Topeka, a distance of 113 miles, is 13 cents, and the single-line and joint-line interstate rates, for like distances, are 17 and 21 cents, respectively. If the present intrastate rates were increased as sought, 12 percent and 2 cents as authorized in Ex Parte Nos. 206 and 212, respectively, for a distance of 113 miles, the rate would be 17 cents, or the same as the concurrently-effective interstate single-line rate for the same distance. On clay sewer pipe, the present intrastate rate for a distance of 169.5 miles is 22 cents, and the corresponding interstate rate is 33 cents. If the present intrastate rate were increased as sought, 12 percent and 5 cents as authorized in Ex Parte Nos. 206 and 212, respectively, the intrastate rate would be 30 cents for the same distance, or 3 cents lower than the concurrently-effective interstate rate for the same distance.

The United Brick and Tile Company, and the W. S. Dickey Clay Manufacturing Company, respectively, producers of clay drain tile and clay sewer pipe, among other things, oppose the increases. Both are served by railroads but are utilizing truck transportation to an increasing degree to transport their products. They state that any further increases in the intrastate rates on these commodities will result in the diversion of the remainder of the rail movement to truck transportation.

As to drain tile, the producer with a plant at Coffeyville shows that 35 percent of its 1959 tonnage was transported by rail and 65 percent by truck. In 1959, it shipped a total of 642 tons of drain tile to Wichita by railroad, and also

it made the following number of rail carload shipments to the indicated destinations, 11 to Topeka, three to Osborne, three to Hutchinson, three to Lawrence, two to Merriam, three to Salina, and one to Manhattan.

Clay drain tile is sold on a delivered basis, and in order to show the effect of the proposed increases on its movements presently moving by rail, the protestant compares the costs of transporting a shipment by rail and motor to Wichita. In addition, to the rail charges, the producer on a rail shipment, incurs a truck charge for moving the shipment from the railhead to the job site, or two truck charges, one for the movement from the railhead to its yard at Wichita, and another to effectuate delivery to the job site. At the present rail rate, including truck delivery to job site, its transportation cost to Wichita is $15.37 per thousand drain tile, and with two truck movements, the cost is $22.92 per thousand drain tile. The total cost for a truck movement, with delivery direct to job site, is $18.00 per thousand drain tile, and, apparently, if trucked from origin to the shipper's yard at Wichita, and subsequently trucked to the job site, the total truck cost is $25.00 per thousand drain tile. If the intrastate rate were increased as sought, the total cost to the producer for a rail movement, including truck delivery to job site, would be $17.63 per thousand drain tile, and with two truck movements, $24.87 per thousand drain tile. A similar comparison of the total charges for movement by rail, including truck delivery, and by truck, at the present rates, to the various other rail destinations referred to above, other than Wichita, shows that the present costs by rail are low-

er than the truck costs in four instances, and higher in three. If the rail rates were increased as proposed, the total rail charges to those destinations would exceed the corresponding truck charges in every instance.

Clay sewer pipe is valued at $40.00 per ton, f.o.b. plant, and is generally produced close to the source of its basic ingredient, clay. This commodity is competitive with concrete sewer pipe, the basic ingredients of which are found in many locations, and as a result, can be produced closer to the user's location. As a consequence, the transportation charges incurred by the shipper for the movement of clay sewer pipe is a very important factor in determining whether or not this commodity can compete with concrete sewer pipe at certain points. As a result of the increases in rail rates on this commodity over the years, the producer of clay sewer pipe, with its principal plant at Pittsburg, shows that it has diverted most of the movement of its product from rail to truck. In 1944, 13.8 percent of its total production was shipped by truck, and in 1959, 96.5 percent was shipped by truck. During the years, 1955, 1956, 1957, 1958, and 1959, it made 92, 111, 76, 85, and 59 intrastate shipments by rail, respectively.

The respondents compare their estimated intrastate terminations of 196 carloads of clay drain tile and clay sewer pipe for 1956, based on the movement study of 49 carloads in February, June, and October 1956, made in 305 I.C.C. 335, projected, on brief, for a 12 month-period, with their estimated intrastate terminations of 195 carloads in 1959. They maintain that this showing sustains their contention

that an increase in the intrastate rates on these commodities will result in increased revenues.

Although it is possible that the stability in the intrastate movements for the period between 1956 and 1959 may be attributable, in part, to the fact that this Commission did not grant the sought increases authorized in Ex Parte No. 196 in the intrastate rates as a result of the decision in 305 ICC 335, the protestants' showing on this record is insufficient to rebut the representations of the respondents that an increase in the rates will result in increased revenues. This record shows that on the shipments of clay drain tile to Wichita, if the intrastate rates were increased as proposed, the cost to the shipper of transporting this commodity by rail would be less than by truck. To the other destinations of record, it is significant to note that in the past, clay drain tile moved in rail service to three of the destinations, although the corresponding truck charges for the same service would have been less. Consequently, it is concluded that the increases as sought on clay drain tile would result in substantially increasing the respondents' revenues.

As to clay sewer pipe, the general increase authorized in Ex Parte No. 175 was applied to the intrastate movements of this commodity as a result of the decision in *Kansas Intrastate Freight Rates and Charges*, 293 ICC 57. The increases became effective on intrastate traffic August 11, 1954. Although the Ex Parte No. 175 increase was applied, the protestants' intrastate rail movements totaled 92 carloads in 1955 and increased to 111 carloads in 1956. During the years, 1957-1959, although there was no further increase

in the rail rates, its rail movements declined from 76 to 59 carloads. Under the circumstances, it cannot be concluded that the rail rates have adversely effected the movement of this commodity. Therefore, the conclusion is warranted that an increase in the intrastate rail rates on clay sewer pipe would result in substantially increasing the respondents revenues.

Lightweight building aggregates, including expanded clay or shale cinders.— A maximum reasonable scale of rates for the interstate movement of these commodities from Kansas City, Mo., to Memphis, Tenn., and destinations in Iowa, Kansas, Nebraska, Oklahoma, Arkansas, Louisiana and Texas, was prescribed by this Commission in *Haydite Co. v. A. T. & S. F. Ry. Co.*, 96 ICC 312. This scale of rates has been extended to apply from certain additional Kansas origins, including Wilder and Ottawa, to interstate and intrastate destinations.

As illustrative of the disparity in the present interstate and intrastate rates, the following example should suffice. The present interstate joint-line rate, on the prescribed basis, for a distance of 350 miles, is $4.02 per net ton, and for the same distance, the intrastate rate is $3.48 per net ton. The present intrastate rate, increased as sought, 12 percent and 3 percent (maximum 12 cents per net ton) as authorized in Ex Parte Nos. 206 and 212, respectively, for the same distance, would be $4.02 per net ton, or the same as the concurrently-effective interstate rate on the prescribed basis for the same distance.

The Twin Mountain Rock Company, a producer of volcanic scoria at Twin Mountain, New Mex., supports the

proposed increases on expanded clay or shale cinders. Volcanic scoria is a lightweight building aggregate, and is used primarily in the production of building blocks. Principally, this commodity is competitive in Kansas with expanded clay or shale cinders produced at Ottawa, and to some degree, with lightweight building aggregates produced in Missouri and Oklahoma.

The interstate rates on volcanic scoria and expanded clay or shale cinders, for the same distances, are the same. However, the intrastate rates are less than the corresponding interstate rates to the extent that the former have not been increased to the extent sought. For example, from Twin Mountain, N. Mex., to Wichita, 434 miles, the present interstate rate on volcanic scoria is $4.48 per net ton, and for the same distance, the intrastate rate on expanded clay or shale cinders is $3.89 per net ton. If the latter rate were increased as sought, it would be $4.48 per net ton, and the same as the concurrently-effective interstate rate for the same distance.

Prior to the application of the increases authorized in Ex Parte Nos. 206 and 212 to the interstate rates, in 1956 and 1957, the Twin Mountain Rock Company shipped 818 carloads of its total movement of 1,996 carloads of volcanic scoria to Kansas. However, after the application of the Ex Parte Nos. 206 and 212 increases, of a total movement of 2,494 carloads, it shipped only 555 carloads to Kansas. During the last four months of 1959, and the first two months of 1960, of a total movement of 357 carloads, only 18 carloads were shipped to Kansas destinations. Although the selling price of volcanic scoria, f.o.b. plant, is

approximately 35 percent of the price of expanded clay or shale cinders, this producer maintains that if the present disparity in rates continues, it cannot continue to market its product in parts of Kansas in competition with intrastate producers.

No shipper or consignee testified in opposition to the increases in the intrastate rates on these commodities. The intrastate rates increased as sought would result in substantially increasing the respondents' revenues.

Hay.— The interstate rates on hay between points in Oklahoma and points in Arkansas were prescribed in *Oklahoma Corporation Commission v. A. R. R.*, 80 ICC 607; and in *Oklahoma Corporation Commission v. A. R. R.*, 101 ICC 116, and subsequent decisions, the same scale of rates was prescribed for interstate application between additional points within the Southwest, including Kansas.

Effective May 16, 1954, a reduced interstate scale of rates, designed, in part, to meet truck competition, was established. On intrastate movements, a lower scale of rates for single-line and joint-line movements, which was prescribed by the Kansas Commission, applies. The disparity in the intrastate and interstate rates is illustrated by the following examples. The present joint-line intrastate rates for distances of 50, 100, and 150 miles, are 20, 25 and 29 cents, respectively, and the single-line intrastate rates, minima 20,000 and 30,000 pounds, are 14, 20 and 24 cents, and 10-½, 15 and 18 cents, respectively. The present single-line and joint-line truck-competitive interstate rates, for distances of 50, 100, and 150 miles, are 31, 41 and 48 cents, respectively, and the corresponding rates

on the prescribed interstate basis are 39, 48, and 57 cents, respectively. If the intrastate scales of rates were increased as sought, 5 cents as authorized in Ex Parte No. 212, the joint-line rates for the distances of 50, 100, and 150 miles, would be 27, 33 and 37 cents, respectively, the corresponding single-line rates, minima 20,000 and 30,000 pounds, would be 21, 27 and 32 cents, and 17, 22 and 25 cents, respectively. The resulting rates would be lower in each instant than the concurrently-effective interstate rates on the truck-competitive basis, and lower than rates predicated on the prescribed basis.

There is a substantial movement of hay from points in Kansas to Kansas City, Mo., and St. Joseph, Mo., as well as to the intrastate destinations of Kansas City and Morris. In addition to the scales of rates hereinabove referred to, specific commodity rates have been established from Kansas origins to these destinations, which rates are observed as maximum at intermediate destinations in Kansas. On June 30, 1946, the interstate and intrastate rates to these interstate and intrastate destinations were the same from common origins in Kansas. For example, the rates from Coffeyville to Kansas City and Morris, and Kansas City, Mo., and St. Joseph, Mo., were 15 cents, minimum 20,000 pounds, subject to Rule 34 of the classification, and 11-½ cents, minimum 30,000 pounds. The corresponding present rates are 22 and 17 cents to the intrastate destinations and, to the interstate destinations, the corresponding interstate rates are 35 and 27 cents, or 13 and 10 cents higher than the corresponding intrastate rates. If the intrastate rates were increased as sought, the rates from Coffeyville to

Kansas City and Morris would be 27 and 22 cents, minima 20,000, subject to 34 of the classification, and 30,000 pounds, respectively, and lower than the concurrently-effective interstate rates to Kansas City, Mo., and St. Joseph, Mo.

No shipper or consignee testified in opposition to the increases. The sought increases in the intrastate rates would result in substantially increasing the respondents' revenues.

Refractories and related articles.—The interstate basis of rates on refractories and related articles is related to the interstate basis of rates prescribed by this Commission on brick and related articles in *Southwestern Brick Cases*, 107 ICC 681, and, the intrastate basis of rates is related to a similar scale of rates prescribed on brick and related articles by the Kansas Commission. If the present intrastate rates on refractories and related articles were increased as proposed, 12 percent and 1 cent as authorized in Ex Parte Nos. 206 and 212, respectively, the intrastate rates would be the same as the concurrently-effective interstate rates for the same or comparable distances.

No intrastate movements of refractories and related articles are shown. As a result there is no indication as to whether or not an increase in the intrastate rates on these commodities would result in increased revenues.

Bituminous coal.—This commodity is mined in southeastern Kansas in the general area of Pittsburg. Bituminous coal moves from the Pittsburg-group origins to intrastate destinations as well as to interstate destinations in Iowa, Missouri, and Nebraska.

The interstate rates on lump and slack coal[18] were prescribed from origins in the Pittsburg group to various interstate destinations in *Midwest Coal Traffic Bureau v. Arkansas Valley I. Ry. Co.*, 173 ICC 467, and 238 ICC 539. The same scale of rates was prescribed by the Kansas Commission for intrastate application. The prescribed basis of rates has been voluntarily reduced, particularly on slack coal,[19] from the Pittsburg-group origins to certain interstate and intrastate destinations to meet truck and threatened barge competition.

The respondents seek the increases authorized in Ex Parte No. 206 of 15 cents per net ton except (a) on shipments from Maxine to Clemens, No. 22, which points are within the Pittsburg group, and (b) on shipments of industrial coal from the Pittsburg-group origins to Kansas City; and, the increase of 10 cents per net ton authorized in Ex Parte No. 212.

As indicative of the disparity in the interstate and intrastate rates, the present intrastate rates on lump and slack coal from West Mineral, a point within the Pittsburg group, to Topeka, are $3.27 and $2.59 per net ton, respectively; and the present interstate rates on lump and slack coal from Catoosa, Okla., which is within the Tulsa-group origin, to Topeka, are $4.31 and $3.82 per net ton, respectively, or $1.04 and $1.23 per net ton higher than the

[18] Rates applicable on slack coal also apply on industrial coal unless rates are specifically published on the latter.

[19] Coal which will pass through a screen with round hole openings not exceeding 2 or 3 inches in diameter, and referred to as fine or industrial coal.

corresponding intrastate rates from West Mineral to Topeka. Prior to the application of the Ex Parte Nos. 206 and 212 increases of 25 cents per net ton on the interstate movements, the corresponding interstate rates from Catoosa to Topeka, were $4.06 and $3.57 per net ton, or 79 and 98 cents per net ton higher than the corresponding rates from West Mineral. If the intrastate rates were increased as proposed, they would be $3.52 and $2.84 per net ton from Pittsburg-group origins to Topeka on lump and slack coal, respectively, and the original relationship in rates on movements from Catoosa and the Pittsburg-group origins to Topeka would be restored. Similarly, prior existing relationship in rates on coal from the Pittsburg-group origins and the interstate-group origins of Henryetta, Okla., Greenwood, and Spadra, Ark., to common points in Kansas would be re-established. The intrastate rates, increased as sought, would be no higher than concurrently-effective interstate rates for the same or comparable distances, and lower than corresponding rates predicated on the prescribed basis.

Since the respondents did not apply the increase authorized in Ex Parte No. 206 on the movements of industrial coal from interstate origins in Missouri and Oklahoma to Kansas City, the respondents here seek only the increase of 10 cents per net ton authorized in Ex Parte No. 212 on movements from the Pittsburg-group origins to the same destination. Prior to the application of the Ex Parte No. 212 increase on the interstate movements of industrial coal, the rates from the Pittsburg-group origins to Kansas City, Mo., and Kansas City, were the same,

$1.98 per net ton. The present intrastate rate from the same origin to Kansas City is the same, $1.98 per net ton, but the interstate rate to Kansas City, Mo., as a result of the application of the Ex Parte No. 212 increase, is $2.08 per net ton, a difference of 10 cents. The interstate rate, increased as sought, would re-establish the parity in rates existing prior to the application of the Ex Parte No. 212 increase on the interstate rate. The rates increased as sought would be lower than rates made on the prescribed basis from the same origin to the same destination of $3.30 and $2.71 per net ton on lump and slack coal, respectively.

Kansas coal generally moves only to the eastern half of the State, the area east of a line extending from Superior on the Kansas-Nebraska border on the north to Arkansas City on the south. However, in 1959, 96 percent of the Kansas coal of all sizes and 99 percent of the industrial coal moved to the area circumscribed by a line extending from Kansas City on the east to Topeka on the west, thence south and west through Emporia, and thence south and east to Toronto, Fredonia, and Independence to the Kansas-Oklahoma line, and thence eastward to Kansas-Missouri boundary.

The Midwest Coal Traffic Bureau, a non-profit association, comprised of members producing coal in the States of Kansas, Oklahoma, and Missouri, and The Board of Public Utilities of Kansas City oppose the increases.

The members of the Midwest Coal Traffic Bureau produce over 90 percent of all the Kansas coal, and over 95 percent of the Kansas coal which is shipped by rail. It is the position of this association that any increase in the

intrastate coal rates will result in a reduction in the volume of movement by rail with the resultant reduction in rail revenues. In support of this position, it cites, principally, the decline in the production of coal due to the increasing use of competitive fuels, and the diversion of the coal movement from the railroads to trucks.

The competitive situation between coal and other fuels, such as natural gas, liquefied petroleum gas, and fuel oil, is more acute in Kansas than in other areas of the country. Natural gas and petroleum are produced in the same areas in Kansas as is coal, and, in addition, large deposits of both commodities exist in the western half of the State. Natural gas and fuel oils, which move primarily by pipeline, and liquefied petroleum gas, which moves predominately by truck, have supplanted coal for household uses, and for industrial uses by the smaller industries, such as bakeries. Coal is primarily used by the larger industrial facilities, including public utilities.

Although there has been a decrease in the national production of coal, the rate of production in Kansas has decreased at a greater rate. The national production of coal in 1959, as compared to 1946, declined approximately 124,000,000 net tons, or 23.2 percent, and the Kansas production declined approximately 1,763,000 net tons or 70.7 percent during the same period. Comparing the production in 1959, with that in 1958, the national production declined .1 percent and the Kansas production declined 15 percent. In 1954, there were 44 mines in Kansas and, in 1959 there were only 21.

In addition to the declining production of Kansas coal, the protestants stress the fact that increased rates have compelled shippers using rail service to resort to truck transportation to minimize costs in order to remain competitive with other fuels. As an illustration of this trend, the protestants show that in 1950, to interstate and intrastate destinations, 1,917,172 tons of coal moved by rail and 142,880 tons moved by truck, or 90.2 and 6.7 percent, respectively, of the total Kansas production by mines producing more than 1,000 net tons annually; but, in 1958, only 79.2 percent of the total Kansas production moved by rail and 20.7 moved by truck. Further, in support of their position, the protestants show that the movement by rail is declining more rapidly than the decline in the production of coal, but that the truck movement is increasing; and that with an increase in production, the railroads received a smaller amount of the increased production, and the trucks a greater amount. For example, between 1950 and 1958, coal production in Kansas declined by 61.3 percent, and the rail movements declined 66 percent, but the truck movements increased 19 percent. In 1958, as compared to 1957, there was an increase of 9.9 percent in the production of Kansas coal, but the rail movement increased only 6-½ percent and the truck movement increased 59.3 percent.

The Board of Public Utilites of Kansas City produces and distributes electrical energy. It operates two power stations. Its steam generators were designed to burn pulverized bituminous coal of the type mined in southeastern Kansas. This utility uses approximately 25 percent of all

the coal shipped by Kansas producers, members of the Midwest Coal Traffic Bureau.

Because of the increased cost experienced in the use of intrastate coal, principally due to increased freight rates, this utility also uses natural gas and interstate coal to produce electrical energy. At the present, the delivered price of coal is more expensive than gas. Apparently this utility has some difficulty in obstaining gas in the winter months. However, in 1959, 52 percent of the power produced by it was by the use of coal and 48 percent by the use of gas. An increase in the coal rates will result in increased use of natural gas. In 1959, this utility received 150,000 tons of coal from Kansas origins, and approximately 69,000 tons was purchased from interstate origins of Clinton and Bevier, Mo. The rate from these origins is $1.62 and the rate from the Kansas origins is $1.98. Due to the differences in the quality of the coal, it is more favorable for it to use Kansas coal. However, with an increase in the Kansas coal rates, this utility will increase its use of interstate coal.

The respondents cite the fact that the estimate of 3,775 intrastate carload movements for 1959 is similar to their estimate for 1956 of between 2,736 and 4,240 carloads made in 305 ICC 335, which estimate, the respondents point out, did not include movements to Kansas City since those rates were not in issue in the proceeding. Further, the respondents emphasize that their estimate is understated since the protestants show the 1959 movement as 4,321 carloads. Apparently, on the predicate that the intrastate

movement of coal by rail has remained relatively stable since 1956, the respondents contend that the sought increases will result in the increased revenues. However, the stability of the movement since 1956 may be attributable, in part, to the fact that in the cited proceeding this Commission found that the intrastate rates on coal were not unduly discriminatory, and the respondents did not obtain the increases sought therein.

Further, in 305 ICC 335, this Commission found that the number of operating mines in Kansas decreased from 44 in 1954 to 33 in 1956; and that the Kansas production declined, between 1946 and 1956, approximately 67 percent, and that during the same period, the national production declined approximately six percent and stated:

> Any substantial increase in revenue from coal rates increased as sought is questionable in view of the declining production in Kansas and the expanding use of competitive fuels.

Here, the record shows that there has been a continuing decline in the number of operating mines and in the production of Kansas coal. In 1959, there were only 21 operating mines as contrasted to the 33 in 1956, and comparing 1959 with 1946, while the national production of coal decreased 124,000,000 tons, or 23.4 percent, the Kansas production declined 1,763,000 tons or 70.7 percent. In 1959, the production of Kansas coal decreased 15 percent as compared to the production in 1958, and the national production in the same period only decreased .1 percent. In addition, here, the respondents propose to increase the rates on coal to Kansas City, whereas, in the cited pro-

ceeding, no increase was proposed on such movements.» At Kansas City, the record shows that the purchaser of approximately 25 percent of the intrastate coal produced by members of the Midwest Coal Traffic Bureau is using gas to produce 48 percent of its electrical energy, and is also using interstate coal of inferior quality in order to reduce the delivered cost of its raw material. Under the circumstances, the conclusion of this Commission, hereinabove quoted, is equally appropriate, if not more appropriate, here. Consequently, an increase in the intrastate rates on coal as sought would not result in substantially increasing the respondents' revenues.

Petroleum and petroleum products.— The interstate rates on refined petroleum products, in tank cars and packages, were prescribed in *Rates on Refined Petroleum Products in the Southwest*, 171 ICC 381; and, in the same proceeding the intrastate rates on low grade petroleum products, including crude oil, in tank cars and packages, were prescribed also, and reflect rates made 80 percent of the rates prescribed on gasoline, in tank cars and packages, respectively.

As to refined and low grade petroleum products, in packages, the present interstate rates are on the prescribed basis. For example, for a distance of 350 miles, the present interstate rate is 69 cents on refined petroleum products, and, on low grade petroleum products, the rate is 55-½ cents. The corresponding intrastate rates are 61 and 49 cents. The respondents propose to increase the intrastate level of rates to the prescribed interstate level by applying the 12 percent and 1 cent increases authorized

in Ex Parte Nos. 206 and 212, respectively. The intrastate rates so increased would be the same as the concurrently-effective interstate rates for the same distances.

As to refined and low grade petroleum products, in tank cars, except asphalt and liquefied petroleum products, in tank cars, a truck-competitive scale of rates has been established on interstate and intrastate movements. The present intrastate rate, for example, for a distance of 350 miles, is 43 cents. In order to raise the intrastate level to the interstate level of rates, the respondents propose to increase the intrastate level by applying 5 percent of the 12 percent increase authorized in Ex Parte No. 206 and the 1 cent increase (except on gasoline) authorized in Ex Parte No. 212. For example, for a distance of 350 miles, the intrastate rate, increased as proposed, would be 46 cents for all commodities, except gasoline, and 45 cents for gasoline, or the same as the concurrently-effective interstate rate on like commodities for the same distance, and lower than corresponding rates predicated on the prescribed level.

As to the rates on asphalt, in tank cars, a reduced scale of rates for both interstate and intrastate application has been established. The scale is comparable to the truck-competitive scale of rates applicable on refined and low grade petroleum products, in tank cars. However, the scale is higher for distances up to 180 miles, the same for distances between 180 and 200 miles, and less for the longer distances. In order to bring the intrastate level up to the interstate level of rates, application of the 1 cent increase authorized in Ex Parte No. 212 only is sought. The pres-

ent intrastate rate for a distance of 350 miles is 38 cents, and increased as proposed, the rate would be 39 cents, or the same as the interstate rate, and lower than the corresponding rate predicated on the prescribed level.

A reduced scale of rates applies on petroleum crude oil, petroleum oil residuum, and other petroleum oils. The scale was designed to meet pipeline and truck competition. The scale is lower than the truck-competitive scale of rates referred to above. The present joint-line intrastate rate from Phillipsburg to Coffeyville, for example, a distance of 351 miles, is 21 cents, and increased 12 percent and 1 cent as authorized in Ex Parte Nos. 206 and 212, respectively, would be 25 cents, or the same as the corresponding interstate rate. The resulting rate would be less than the corresponding interstate rate based on the truck-competitive scale of 46 cents, and less than the corresponding rate made on the prescribed basis of 55-½ cents.

The interstate rates on refined petroleum products, in packages, to Kansas City, Mo.-Kansas., area from Kansas and Oklahoma origins were prescribed in *Midcontinent Oil Rates, 1925*, 112 ICC 421. To meet pipeline competition, the rates established, following the decision, were lower than those prescribed. The present intrastate rate on refined petroleum products, in packages, from Kansas group 2 origins, for example, Wichita, to Kansas City is 35 cents, and the interstate rate from the same origin to Kansas City, Mo., is 40 cents. The intrastate rate increased as proposed, 12 percent and 1 cent as authorized in Ex Parte Nos. 206 and 212, respectively, would be the same as

the interstate rate and less than the corresponding rate predicated on the prescribed basis.

The interstate rates on refined oil, in tank cars, except liquefied petroleum gas, from Kansas group 2 points and Oklahoma group 3 points to the Kansas City, Mo.,-Kans., area, were prescribed in *Petroleum Rail Shippers' Association v. Alton & Southern Railroad*, 243 ICC 589. The present intrastate rate from Kansas group 2 origins, for example, Wichita, to Kansas City is 27 cents, and, increased as proposed, 12 percent and 1 cent as authorized in Ex Parte Nos. 206 and 212, respectively, would be 31 cents, or the same as the interstate rate from the same origin to Kansas City, Mo., and lower than the corresponding rate predicated on the prescribed level.

As to liquefied petroleum gas, in tank cars, only the Ex Parte No. 206 increase is sought on intrastate movements to Kansas City. The rates from Kansas group 2 origins and Oklahoma group 3 origins to Kansas City, Mo.,-Kans., area were prescribed in *Montana-Dakota Utilities v. A. T. & S. F. Ry.*, 268 ICC 769. The present intrastate rate from Kansas group 2 origins, for example, Wichita, to Kansas City is 30 cents, and, increased as proposed, 12 percent as authorized in Ex Parte No. 206, would be the same as the interstate rate of 34 cents to Kansas City, Mo., and lower than the corresponding rate made on the prescribed basis.

Any increase in the rates on certain of these commodities is opposed by American Petrofina Company and Skelly Oil Company, each of which has refineries at El Dorado, among other places. Each of the refineries is

served by railroads. In general, both producers, of petroleum and petroleum products, contend that an increase in the intrastate rates will divert the present movement of these commodities from rail to truck with the result that the increases in rates will not result in increased revenues.

One of the producers specifically opposes the increases on asphalt, and residual fuel oil. In 1957, this producer shipped 92.7 percent of its asphalt intrastate movements by truck and 7.3 percent by rail. In 1958 and 1959, it shipped 94.7 percent of its asphalt intrastate movements by truck and 5.3 percent by rail, and 94.0 percent by truck, and 6.0 percent by rail, respectively. Although the percentage of this producer's intrastate movements by rail has declined since 1957, the number of shipments by railroad, in 1958 and 1959, has increased due to increased production. This producer attributes the increase in the rail shipments of asphalt in 1958 and 1959 to the rail reduction in intrastate rates effective March 1, 1958, and September 12, 1959. In 1959, this producer shipped 18 percent of its residual fuel oil production by rail, or 176 tank-carloads, and 82 percent by truck.

The other producer opposes the increases in the intrastate rates on gasoline and other petroleum products taking the same rates, such as fuel oil distillates, in tank cars, and liquefied petroleum gas and asphalt in tank cars. As to gasoline and petroleum products taking the same rates, including fuel oil distillates, in tank cars, the railroads have maintained their rates generally on the same level as the motor rates. However, with the proposed increases, the intrastate rail rates on these commodities

will exceed the corresponding truck rates. In general, on interstate movements, the railroads maintain their rates equal to or lower than, the truck rates to remain competitive. For example, the railroads maintain rates on these commodities between Kansas City and Council Bluffs, Iowa, and points in Missouri and Nebraska, the same as the truck rates for distances under 65 miles, and lower than the corresponding motor rates for the longer distances. This producer maintains that since the rail rates as increased will exceed the corresponding truck rates, the shipments presently moving by rail will be diverted to trucks.

As to liquefied petroleum gas, approximately 15 years ago, this producer shipped practically 100 percent of its production of this commodity by rail. However, during the months of September, October, and November 1959, 76.7 percent of its intrastate movements were by truck and 23.3 percent by rail. The present truck rates are lower than the rail rates for distances up to 225 miles, and higher for the longer distances. The railroads are handling this traffic for the longer hauls. If the rates are increased as proposed, the rail rates will continue to be higher for the shorter distances, and lower for the longer distances; but, for the longer distances, the former spread maintained between the truck and rail rates would be reduced.

As to asphalt, there has been a steady diversion of the movement of this product by the producer from rails to trucks. In 1952, of a total intrastate movement of 8,992,052 gallons, 65.4 percent moved by rail and 34.6 percent by truck, and 1959, of a total production of 12,812,037 gallons, only 7.3 percent moved intrastate by rail. Although an

increase in the rail asphalt rates would narrow the spread between the rail and motor rates, the rail rates, nevertheless, will be lower for corresponding distances. However, this producer states that the truck service has certain advantages for which the shippers are willing to pay higher rates, and, with the narrowing of the spread in the rail and truck rates, increased movement by truck can be anticipated. This protestant states that the recent reductions which have been made in the intrastate rates on this commodity would be nullified by the proposed increases in the rates.

As noted, the protestants' evidence is directed primarily to the proposed increases in the rates on gasoline and petroleum products taking the same rates, including fuel oil distillates, and residual fuel oils, asphalt, and liquefied petroleum gas, in tank cars. In general, with the exception of gasoline and petroleum products taking the same rates, if the present intrastate rates moving the traffic were increased as proposed, the resulting rates on liquefied petroleum gas and asphalt would remain lower than the corresponding truck rates, for the longer distances and for all distances, respectively. The record does not show convincingly that the advantages of moving by truck would outweigh the remaining rail rate advantage so as to divert the present rail movement to trucks. Consequently, it is concluded that an increase in the intrastate rates as proposed on these commodities would result in substantially increasing the respondents' revenues.

As to gasoline and petroleum products taking the same rates, in tank cars, the situation is quite different. If the

rates were increased as proposed, the rail rates would be higher than the corresponding motor rates in all instances. This result would be inconsistent with respondents' past policy of maintaining the rail rates on the same level as the truck rates, in order, apparently, to permit the respondents to effectively compete for the movement of this traffic in intrastate commerce. Under the circumstances, it is extremely doubtful that an increase in the rates on these commodities would result in substantially increasing the respondents' revenues.

General discussion.—The increases authorized in Ex Parte Nos. 206 and 212 were predicated upon the need of the railroads generally, including the respondents herein, for additional revenues to enable them to meet increased operating expenses, which were incurred in connection with their interstate as well as intrastate operations. By the proposed increases, the respondents are attempting to obtain from the Kansas intrastate traffic a contribution to their operating expenses more nearly approximating the proportionate contribution to such expenses made by that traffic prior to the increases authorized in Ex Parte Nos. 206 and 212. Such contribution has been held to be valid criterion of fairness. *Missouri Intrastate Freight Rates and Charges*, 289 ICC 633.

In addition to establishing the disparity in the intrastate and interstate rates, to the extent the former do not include the increases sought resulting from the authorizations in Ex Parte Nos. 206 and 212, and their urgent need for additional revenues, the respondents have established that (1) the conditions incident to the transportation of the

traffic in issue within Kansas are no more favorable than those incident to the interstate transportation of like traffic to, from, or through points in Kansas, (2) the interstate rates for the movement of like traffic to, from and through points in Kansas, are not in excess of maximum reasonable rates, and (3) the intrastate rates on the commodities in issue are lower than, and, if increased as sought, will not exceed, the concurrently-effective interstate rates on like traffic moving under substantially similar circumstances and conditions to, from and through points in Kansas for the same or comparable distances. However, before this Commission can conclude that the intrastate rates unduly discriminate against, or place an undue burden on, interstate or foreign commerce, in addition to the above showing, it is essential that the respondents establish that an increase in the intrastate rates will result in substantially increasing their revenues.

The ability of the intrastate traffic in issue to sustain the proposed increases, and thereby provide its fair share of the revenues to meet the increased costs of operation is the principal issue in this proceeding. The evidence of record, particularly that of the protestants, has been directed to this issue. For the reasons heretofore set forth, the application of the increases sought in the intrastate rates on all of the commodities in issue, except crushed stone, sand, gravel, and road aggregates, including chat; refractories and related articles; bituminous coal; and gasoline and petroleum products taking the same rates, will result in substantially increasing the respondents' revenues. The failure of such traffic to bear its fair pro-

portionate share of the increased operating expenses by providing additional revenues commensurate with those now provided by interstate traffic unduly discriminates against, and places an undue burden on, interstate or foreign commerce. However, for the reasons also hereinabove set forth, it is clear that any increase in the revenues which would be obtained by the respondents resulting from increasing the intrastate rates on crushed stone, sand, gravel, and road aggregates, including chat; bituminous coal; and gasoline and petroleum products taking the same rates, would be more than offset by a decline in the amount of this traffic moving by rail. In the absence of any intrastate movements of refractories and related articles, the essential finding that an increase in the intrastate rates on these commodities will result in increased revenue cannot be sustained. *Nebraska Intrastate Freight Rates and Charges*, 287 ICC 445.

With the exception of the intrastate rates on expanded clay or shale cinders, there is no showing here that the intrastate rates on the commodities in issue unduly prefer intrastate shippers or localities, on the one hand, and unduly prejudice interstate shippers or localities, on the other. In the absence of such evidence, a finding that the intrastate shippers or localities are unduly preferred cannot be sustained. *Texas Intrastate Freight Rates and Charges*, 308 ICC 261. However, as to expanded clay or shale cinders, the record clearly shows that the intrastate rates on these commodities unduly prejudice the interstate shipper of volcanic scoria at Twin Mountain, N. Mex., and unduly prefer the intrastate shipper at Ottawa.

Ultimate findings and conclusions.—Premised upon the foregoing facts, the examiner finds that:

1. Conditions incident to the intrastate transportation within Kansas of agricultural limestone; clay drain tile and clay sewer pipe, and related articles; lightweight building aggregates, including expanded clay or shale cinders; hay; and petroleum and petroleum products, except gasoline and petroleum products taking the same rates, are no more favorable than those incident to the interstate transportation of like traffic to, from and through points in Kansas.

2. The amounts and percentages by which interstate freight rates and charges on the commodities named in finding 1 between points in Kansas and points in adjoining states, were increased, as authorized in Ex Parte Nos. 206 and 212, are just and reasonable.

3. The present Kansas intrastate freight rates on the commodities named in finding 1, imposed by authority of the State, are abnormally low, and are not contributing their fair share of the revenues required by the respondents to enable them, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and thereby accomplishing the purposes of the Interstate Commerce Act, as set forth in the national transportation policy declared by the Congress, to develop and preserve a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense; the burden thus cast upon interstate

commerce is undue in and to the extent that those intrastate rates and charges are less than they would be on the bases herein approved; and such intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against, and an undue burden on, interstate commerce.

4. Kansas intrastate rates on expanded clay or shale cinders cause undue and unreasonable advantage and preference to intrastate shippers, particularly the shipper located at Ottawa, and undue prejudice to interstate shippers, especially the shipper located at Twin Mountain, N. Mex.

5. The unlawfulness herein found to exist should be removed by applying to the Kansas intrastate rates and charges on the commodities described in finding 1 the same respective increases as are maintained by the respondents on like interstate traffic between points in Kansas and points in adjoining states, as authorized in Ex Parte No. 206 (299 ICC 429, 300 ICC 633) and Ex Parte No. 212, (302 ICC 665, 304 ICC 289), provided that increases may not be made in intrastate rates to levels higher than the interstate rates on like traffic to, from or through points in Kansas for like or greater short-line distances over the same lines of railroads.

6. The establishment of increases in rates and charges as provided in finding 5 will not result in unreasonable rates or charges, or in rates or charges that are unreasonable in relation to interstate rates or charges, and will increase the revenues of the respondents by substantial amounts.

7. The present intrastate rates on crushed stone, sand, gravel, and road aggregates, including chat; refractories and related articles; bituminous coal; and gasoline and petroleum products taking the same rates, are not shown to cause undue or unreasonable, advantage, preference, or prejudice or undue, unreasonable or unjust discrimination against, or undue burden on, interstate or foreign commerce.

The foregoing ultimate findings are made without prejudice to the right of the authorities of the State of Kansas, or any interested party, to apply for modification thereof as to any individual intrastate rate or charge affected thereby, on the ground that such rate or charge is not related to the interstate rates and charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.

An order carrying into effect the foregoing findings and conclusions will be entered, unless the Kansas Commission, within 30 days from the date of the service of this report, notifies this Commission that it will permit the increases herein approved.

By the Commission, J. T. Fittipaldi, Hearing Examiner.

Dated at Washington, D. C., this day of A. D. 1960.

APPENDIX A

(To the Examiner's Report)

Increases Authorized in Ex Parte No. 206

Commodity	Interstate Increase
	Percent, except as noted.
Crushed stone: sand, gravel; chat; and agricultural limestone.	12
Clay drain tile, clay sewer pipe, and related articles	12
Building aggregates, including expanded clay or shale cinders.	12
Refractories and related articles.	12
Bituminous coal	15 cents per net ton
Petroleum and petroleum products.	12

APPENDIX B

(To the Examiner's Report)

Increases Authorized in Ex Parte No. 212

Commodity	Interstate Increases
Crushed stone; sand; gravel; road aggregates, chat; and agricultural limestone.	3 percent maximum 12 cents per net ton.
Clay drain tile and related articles.	2 cents per 100 pounds.
Clay sewer pipe and related articles.	5 cents per 100 pounds.
Building aggregates, lightweight.	3 percent, maximum 12 cents per net ton.
Refractories and related articles.	1 cent per 100 pounds.
Bituminous coal	10 cents per net ton.
Petroleum and petroleum products, except gasoline, liquefied petroleum gas, butane and propane gas.	1 cent per 100 pounds.
Hay.	5 cents per 100 pounds.

APPENDIX F

National Transportation Policy, 49 USC preceding Section 1:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all models of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act [chapters 1, 8, 12, 13, and 19 of this title] shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * *

Section 49 USC, Sections 13(3) and 13(4)

(3) Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon peti-

tion of the carrier concerned, which petition is authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdicton over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter or chapter 12 of this title.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign com-

merce (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, or burden: *Provided*, That upon the filing of any petition authorized by the provisions of paragraph (3) of this section to be filed by the carrier concerned, the Commission shall forthwith institute an investigation as aforesaid into the lawfulness of such rate, fare, charge, classification, regulation, or practice (whether or not theretofore considered by any State agency or authority and without regard to the pendency before any State agency or authority of any proceeding relating thereto) and shall give special expedition to the hearing and decision therein. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding. Feb. 4, 1887, c. 104, Pt. I, § 13, 24 Stat. 383; June 18, 1910, c. 309, § 11, 36 Stat. 550; Feb. 28, 1920, c. 91, § 416, 41 Stat. 484; Aug. 9, 1935, c. 498, § 1, 49 Stat.

543; Sept. 18, 1940, c. 722, Title I, § 9(b), (c), 54 Stat. 910; Aug. 12, 1958, Pub. L. 85—625, § 4, 72 Stat. 570.

* * * * *

Section 10(e) of Administrative Procedure Act, 5 USC § 1010(e).

(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the courts shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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No. 217

IN THE

Supreme Court of The United States

October Term, 1963

STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS,
Appellant

vs.

UNITED STATES OF AMERICA, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS.

MOTION TO AFFIRM.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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MOTION TO AFFIRM.

Railroad appellees,[1] pursuant to Rule 16(1)(c) of the Revised Rules of this Court, move that the judgment of the district court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

[1] The Atchison, Topeka and Santa Fe Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island and Pacific Railroad Company, The Garden City Western Railway Company, The Kansas City Southern Railway Company, Kansas City Terminal Railway Company, Kansas, Oklahoma & Gulf Railway Company, Midland Valley Railroad Company, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, Northeast Oklahoma Railroad Company, St. Louis-San Francisco Railway Company, and Union Pacific Railroad Company.

STATEMENT.

This is a direct appeal from a final judgment entered April 10, 1963 by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325, dismissing an action brought by appellant to set aside an Interstate Commerce Commission order entered July 31, 1962, increasing certain rates on freight traffic moving intrastate by rail within Kansas. The Commission's order was entered in furtherance of its report and findings of December 1, 1961, in I.C.C. Docket 33239, *Kansas Intrastate Freight Rates and Charges*, 315 I.C.C. 223. The opinion of the district court is reported at 216 F. Supp. 376.

The Interstate Commerce Commission, in its decisions of December 17, 1956 and August 6, 1957, respectively, in Ex Parte No. 206, *Increased Freight Rates, Eastern and Western Territories, 1956*, 299 I.C.C. 429, and *Increased Freight Rates, Eastern, Western and Southern Territories, 1956*, 300 I.C.C. 633, generally authorized increases of 12% in interstate freight rates in Western Territory. Corresponding relief as to Kansas intrastate freight rates was sought by the Kansas railroads; in its decisions of April 23, 1958 and June 2, 1958, the State Corporation Commission of the State of Kansas (hereinafter referred to as the Kansas Commission) authorized increases in intrastate rates on some commodities, but refused to permit any increase in intrastate rates on the following: sand; gravel; crushed stone, including chat; building aggregates, including expanded clay or shale cinders; agricultural limestone; brick; clay sewer pipe; clay drain pipe and related articles; bituminous coal; petroleum and petroleum products, including liquefied petroleum gas; and cement.

In decisions dated February 11, 1958 and September 9, 1958, in Ex Parte No. 212, *Increased Freight Rates, 1958*, 302 I.C.C. 665, 304 I.C.C. 289, the Interstate Commerce

Commission authorized further increases, in varying amounts, in interstate freight rates and charges. Corresponding increases in intrastate freight rates again were sought by the Kansas railroads. The Kansas Commission, in its order of April 22, 1959, authorized corresponding increases in intrastate freight rates on some commodities, but refused to permit increases on the following: sand; gravel; crushed stone; chat; road aggregates; lightweight building aggregates; agricultural limestone; brick; clay sewer pipe, drain tile, and related articles; bituminous coal, petroleum and petroleum products; and hay.

In an order dated December 11, 1959, in its Docket 33239, the Interstate Commerce Commission instituted an investigation under Section 13(4) of the Interstate Commerce Act (49 U.S.C. 13(4)) upon petition of thirteen Kansas railroads (appellees herein) to determine whether intrastate freight rates and charges imposed by authority of the State of Kansas, by reason of the failure of such rates and charges to include increases corresponding to those permitted in interstate rates in Ex Parte Nos. 206 and 212, caused or would cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce, on the other, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce.

Full hearing was had on March 23 through March 25, 1960. The record contains 54 exhibits and 465 pages of testimony. An examiner's recommended report was issued, and the parties were heard in oral argument.

The Interstate Commerce Commission issued its findings and conclusions in a report dated December 1, 1961. The Commission approved the increases sought by the Kansas railroads, except in rates on bituminous coal and refrac-

tories,[2] and concluded that such higher rates would increase the revenues of those railroads by substantial amounts.

Two successive petitions for reconsideration were filed by the Kansas Commission, and these were denied by the Interstate Commerce Commission in orders of April 10, 1962 and July 6, 1962. Thereupon the Interstate Commerce Commission issued its order of July 31, 1962 requiring the Kansas railroads to place into effect the higher intrastate freight rates approved in the Commission's report.

The Kansas Commission, on August 29, 1962, instituted the instant suit seeking to have the Interstate Commerce Commission's order of July 31, 1962 enjoined and set aside. Upon filing of the complaint a three-judge district court was convened.

The plaintiff-appellant contended that finding 6 of the Interstate Commerce Commission's report (315 I.C.C. 241), to the effect that the increased rates "will increase the revenues of the respondents by substantial amounts" was not supported by substantial evidence. After a comprehensive review of the evidence, the court by unanimous opinion concluded that (216 F. Supp. 384):

> "The question of the weight of the evidence was for the Commission and not for the Court. The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case, there is unjust discrimination against interstate commerce and that purpose extended to the prohibited discrimination produced by intrastate rates. In such a situation, when the Commission exercises its authority after hearing and proper application of rules of law, its findings of fact supported by substantial evidence are not subject to review. The Court may not substitute its judgment for that of the Commission. (See State of Florida v. United States, 292 U.S. 1, 54 S. Ct. 603, 78 L. Ed. 1077).

[2] The carriers voluntarily had withdrawn requests for increases in rates on cement and on brick other than refractories.

"We think the Interstate Commerce Commission had before it all of the evidence which was necessary in accordance with the criteria which must be considered in making a decision. Consequently, its judgment must be affirmed."

QUESTIONS PRESENTED FOR REVIEW.

The first question presented by appellant (Jur. St. 3) is whether the 1958 amendment to Section 13(4) of the Interstate Commerce Act (49 U.S.C. 13(4)) makes it unnecessary for the Interstate Commerce Commission to consider what effect an increase in an intrastate freight rate will have upon the volume of intrastate traffic in that commodity, and whether, secondly, that amendment authorizes the Commission to base its order "upon evidence related exclusively to the total revenue effect of system-wide increases on all commodities."

The second question presented is couched in the following language (Jur. St. 3):

"2. Since the enactment of Section 10(e) of the Administrative Procedure Act, is the reviewing court not required to consider and independently weigh the findings of the trial examiner and testimony and evidence opposed to the findings of the Interstate Commerce Commission, in determining whether or not the findings of the Commission are supported by substantial evidence?"

It should be noted that, in appellant's notice of appeal (Jur. St. App. p. 19) the second question is presented in substantially different language, as follows:

"2. In a judicial review of an order of the Interstate Commerce Commission requiring an increase in intrastate rates on a specific commodity, is the court, in determining whether or not the order is supported by substantial evidence, required by Section 10(e) of the Administrative Procedure Act to consider the evidence to the effect that an increase in the intrastate rates on

> that commodity will result in such a diminution in rail movement of the commodity as to result in less, rather than more, rail revenues thereon?"

Question 2 in the notice of appeal, it will be observed, is confined narrowly to the extent to which it is necessary "to consider the evidence to the effect that, etc.," while Question 2 in the Jurisdictional Statement inquires, in much broader terms, whether it is necessary "to consider and independently weigh the findings of the trial examiner and testimony and evidence, etc."

Rule 15(1)(c)(2) of the Rules of this Court provides:

> "The phrasing of the questions presented need not be identical with that set forth in the notice of appeal (see paragraph 2 of Rule 10) but the jurisdictional statement may not raise additional questions or change the substance of the questions already presented."

It is submitted that Question 2 as presented in the Jurisdictional Statement raises additional issues not fairly encompassed within Question 2 of the notice of appeal, is therefore offered in violation of the Rules of this Court, and should not be considered on its merits by the Court. Out of an abundance of caution, however, appellees will discuss Question 2 substantively.

ARGUMENT

The Finding that Revenues Will Be Increased Substantially Is Supported by Substantial Evidence.

The effect of one of the 1958 amendments to Section 13(4) of the Interstate Commerce Act has been brought into issue in Question 1 of the Jurisdictional Statement. The amendment in question added the phrase "undue burden on interstate commerce" in order to facilitate proof of a revenue discrimination. The purpose of this amendment is outlined clearly in the following portion of its legislative history (Senate Report No. 1647, June 3, 1958, 85th Cong., 2nd Sess., p. 20):

> "The grounds upon which the Interstate Commerce Commission may require changes in intrastate rates would be more clearly defined. * * * In many instances, because of the vagueness of this standard, it is impossible as a practical matter to make the showing necessary to justify an order by the Commission requiring an adjustment in intrastate rates, fares, or charges. This situation would be substantially and beneficially corrected by authorizing the Commission also to require changes in intrastate rates, fares, or charges found by it to impose an undue burden on interstate commerce."

Under the amended statute, it is submitted, in an intrastate rate case following a general interstate rate increase proceeding, the Commission must determine whether the evidence discloses any intrastate transportation or economic conditions so different as to warrant an exception to the interstate order; in the absence of such a showing, as is the case here, the evidence which forms the basis of the Commission's nationwide orders becomes the natural basis for its order in this case. Although here the evidence in support of the Commission's order would have been adequate in the light of the judicial interpretations of Section 13(4)

before the 1958 amendment, under that amendment the standards are less exacting.

Apart from the effect of the 1958 amendment to Sec. 13(4) of the Interstate Commerce Act, appellant is in error in insisting that the effect of increased freight rates upon the *volume* of traffic is in itself significant (Jur. St. 3, 7). What is significant is the effect of increased freight rates upon gross revenues, which may thereby be increased even if there is some diminution in volume. This critical distinction has been recognized repeatedly by the Commission and the courts. For example, in *South Carolina Intrastate Freight Rates and Charges*, 296 I.C.C. 159, 177, affirmed in *South Carolina* v. *United States*, 136 F. Supp. 897 (E.D. S.C., 1956), affirmed *per curiam* 351 U.S. 944 (1956), the Commission stated:

> "While the evidence is convincing that some, and perhaps a material, diversion of traffic in some of these commodities will result from the increases herein approved, nevertheless, after weighing carefully protestants' and respondents' testimony, we reach the conclusion that a substantial increase in respondents' revenues can reasonably be expected from intrastate rates as thus increased, and that such rates will not in any instance exceed a just and reasonable basis."

To the same effect, see *Arkansas Intrastate Freight Rates and Charges*, 298 I.C.C. 547, 560, affirmed in *Arkansas Public Service Commission* v. *United States*, 147 F. Supp. 454 (E.D. Ark., 1956), affirmed *per curiam* 355 U.S. 4 (1957); *Louisiana Intrastate Freight Rates and Charges*, 291 I.C.C. 276, 314, affirmed in *Louisiana Public Service Commission* v. *United States*, 125 F. Supp. 180 (E.D. La., 1954), affirmed *per curiam* 348 U.S. 885 (1954).

In the instant case, substantial evidence, discussed fully by the district court (216 F. Supp. 376, 381-384) demonstrates that the proposed rate increases might reasonably

be expected to produce substantial additional revenues for the carriers, as found by the Commission. The irrelevance of the effect of a rate increase upon volume of traffic alone, without consideration of its effect upon gross revenues, is illustrated by the court's analysis of Exhibit 25 (216 F. Supp. 383):

> "Mr. William R. Wientge, Commerce Assistant of the St. Louis-San Francisco Railway, discussed Exhibit 25 showing that company's tonnage and freight revenues for each year from 1946 through 1959 (R. 182). Exhibit 25 indicated that the Frisco's system tonnage for 1959 was only 91.5 per cent of that of 1946 while system revenue in 1959 was 150 per cent of that of 1946, demonstrating that a loss in traffic does not necessarily make rate increases self-defeating."

The second issue raised by Question 1 in the Jurisdictional Statement is whether the Commission's finding that the increased rates would produce substantial increases in revenue can be based "upon evidence related exclusively to the total revenue effect of system-wide increases on all commodities." The question presented by appellant is inaccurate in its description of the evidence presented by these appellees. The evidence which appellees did present is much more comprehensive than is implied by use of the word "exclusively."

Particularly significant is the testimony presented by Mr. Herman C. Kroll, Manager of the Western Traffic Association. Page 1 of Exhibit 35, prepared and presented by Mr. Kroll, demonstrated that the major Kansas railroads handled 4.60 per cent more ton-miles in 1958 than in 1946 and earned 51.05 per cent more gross freight revenue in 1958 than in 1946. The years 1946 to 1958, inclusive, were years of recurring interstate and intrastate freight rate increases, and the evidence in this exhibit shows that any traffic diversion that might have been suffered by the Kansas railroads was not sufficient to defeat the purpose of

the rate increases, that is, the production of greater revenue. Even more pertinent is page 2 of the same exhibit, which shows the revenue trends of these same railroads considering only traffic to, from, through, and within Kansas; the ton-miles of Kansas traffic rose 4.03 per cent from 1946 to 1958, but the freight revenues increased 56.44 per cent in the same period. Significant extracts from the record of the direct and cross examination of Mr. Kroll are as follows:

> "The exhibit which has been marked for identification as 35 has been prepared for the purpose of demonstrating what the experience of the carriers has been with the Ex Parte increases which have become effective in the post-war period. (R. 336)[3].
>
> "The information shown in column 4, I believe, demonstrates that the Ex Parte increases have accomplished exactly what the carriers intended them to do, and that is to produce substantially increased revenues on rather short notice, because with the ton miles in 1958 4.6 per cent higher than they were in 1956, the gross freight revenue is 51.05 per cent greater.
>
> "On page two of this exhibit, I have made a similar comparison, but here I am dealing with the tons, ton miles and revenues of traffic handled to, from, through and within the state of Kansas. Here we find a very similar situation to what was true of the system operations.
>
> "I will not burden the record by reading all the figures, but will merely use 1958 as an example. The tons carried in 1958 were approximately three per cent less than they were in 1946. Nevertheless, the revenue ton-miles were 4.03 per cent greater and the revenue was 56.44 per cent greater. (R. 337).
>
> • • • • •
>
> "Q. (by Mr. Gray) It's not intended to prove that you get any additional revenue even though the par-

[3] References to pages of the transcript of the proceedings before the Interstate Commerce Commission are identified herein with the prefix "R."

ticular increases sought here are granted, is that correct?

A. Well, Mr. Gray, as a statistician, I think that Exhibit 35 leads you almost to the inescapable conclusion that there are going to be some increased revenues, but I don't feel as a statistician I can say with any preciseness . . ." (R. 342).

Supplementing Mr. Kroll's presentation, experienced traffic officials of five of the major Kansas railroads testified that the proposed rate increases could be expected to produce increases in revenues. Furthermore, each of these witnesses supported his opinion testimony with statistical evidence concerning the effect of previous general rate increases in producing higher revenues for their respective companies (R. 52-54, 80, 107, 133-135, 177-179, 181-193, 195-219, Exs. 19, 23-26). The testimony of these witnesses, as well as of Mr. Kroll, was discussed at some length by the district court (216 F. Supp. 381-384).

The court below concluded that the evidence presented by the railroads to the effect that the increased freight rates would not be self-defeating and could reasonably be expected to produce substantially greater revenue was sufficient to satisfy the requirements of Section 13(4) of the Interstate Commerce Act. The court stated (216 F. Supp. 384):

"These witnesses, representing the railroad systems operating in Kansas and familiar with the traffic rates and revenues of the various companies, testified with certainty that while there might be some diversion of traffic, (by reason of the increase in rates) the net result of the increase of rates would be to substantially increase revenues. Plaintiff complains that the evidence offered by these witnesses was based on consideration of the effect of general increases on all commodities in the past and not upon what the result might be in the future as to particular commodities. As stated

> previously, in this proceeding the Commission is not obliged to consider reasonableness of each individual rate before carrying into effect the necessary increased schedule. The Commission may provide in its order for modification of the general order in specific situations where the general order might not be justly applicable. (See King v. United States, 344 U.S. 254, 275, 73 S. Ct. 259, 97 L. Ed. 301 (1952)). This, the Commission by its order, made provision for in this case."

The foregoing conclusion of the district court is correct, it is submitted, in its analysis of the measure of evidence required to support the conclusion that the rate increases will result in substantial revenue increases. *Arkansas Public Service Commission* v. *United States*, 147 F. Supp. 454 (E. D. Ark., 1956) affirmed *per curiam* 355 U.S. 4 (1957), upheld (insofar as is pertinent here) the Commission's decision in approving intrastate freight rate increases in *Arkansas Intrastate Freight Rates and Charges*, 298 I.C.C. 547. Evidence of the railroads in that case on the question whether the rate increases would result in substantial revenue increases was based upon predictions of traffic officials of the principal Arkansas railroads, supported by statistical evidence showing trends of tonnage and revenue (298 I.C.C. 559) similar to what was offered in the instant case. The district court there described such supporting evidence as "quite substantial" (147 F. Supp. 464).

In *Increases in Intrastate Freight Rates*, 186 I.C.C. 615, 642, the Commission, in approving proposed increases in certain Louisiana intrastate rates, noted that (186 I.C.C. 640):

> "Railroad traffic men expressed the opinion that, notwithstanding possible diversion of traffic to other transportation agencies, the addition of the surcharges to the intrastate rates would produce an increase in revenue."

In upholding the Commission's order, the Supreme Court, in the leading case of *United States* v. *Louisiana*, 290 U.S. 70, 80 (1933), declared:

> "There are no formal requirements for the findings to be made by the Commission in this type of case, see Manufacturers Ry. Co. v. United States, 246 U.S. 457, 490, and while the particular form in which they were cast here is not to be commended, the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data, including estimates of experienced railroad traffic men, to which the report refers, that the probability of increased revenue was sufficiently great to make the increase of rates a reasonable exercise of sound managerial judgment. This, we think, meets the requirements of the statute."

Evidence Relied Upon by Plaintiff-Appellant.

Question 2 of the Jurisdictional Statement inquires, in determining whether the Commission's findings are supported by substantial evidence, whether the reviewing court must "consider and independently weigh" (a) those findings of the examiner which were inconsistent with some of the subsequent findings of the Commission, and (b) evidence of record not consistent with the findings of the Commission.

The appellant seemingly urges that the reviewing court should give particular weight to the findings of the hearing examiner. In effect, it is submitted, the appellant is urging that the court should substitute the examiner's views for the views of the Commission in weighing the evidence; it is well established that the reviewing court cannot do that which appellant urges it is required to do. In *Cleveland Electric Illuminating Co.* v. *United States*, 147 F. Supp. 622 (N.D. Ohio, 1956), affirmed *per curiam* 354 U.S. 917 (1957) which likewise involved an order of the Interstate

Commerce Commission increasing intrastate freight rates, the reviewing court stated (147 F. Supp. 630):

> "This court cannot substitute its judgment or *the judgment of the examiner* for that of the Commission." (Emphasis supplied.)

To the same effect, see *Norfolk Southern Bus Corp.* v. *United States*, 96 F. Supp. 756, 758 (E.D. Va., 1950), affirmed *per curiam* 340 U.S. 802 (1950).

Appellant has charged that the district court "looked only to evidence supporting the order" (Jur. St. 6, 10). However, it is perfectly clear from reading the district court's opinion that that court did, in fact, review all of the evidence and not merely the substantial evidence supporting the order. Thus, the court stated (216 F. Supp. 380):

> "It is clear to the Court, after *examining* this section and *the entire record* . . .
>
> • • • • •
>
> "Upon an *examination of the record*, we must conclude that the Interstate Commerce Commission applied the correct rule of law to the problem which was before it for consideration." (Emphasis supplied.)

A significant indication that the Interstate Commerce Commission, as well as the district court, did in fact give careful consideration to evidence presented in opposition to the proposed rate increases is found in the Commission's conclusion that the evidence did not justify increasing the rates on bituminous coal. In *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286 (1934), this Court declared:

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. In this instance the care and patience with which the Commission fulfilled its appointed task are plain, even to the casual reader,

> upon the face of the report. The rates were not approved as the respondents had submitted them. For the 80,000 pound minimum, they were found to be too low. Not till there had been an increase of four cents per 100 pounds did the schedule win approval. There was a sedulous endeavor to guard against a rate war that would end in mere oppression."

In essence, the appellant's argument is that the findings of the Commission are contrary to the weight of the evidence, and that the district court erred in failing to draw inferences contrary to those drawn by the Commission.

An examination of the evidence of record will demonstrate that the testimony of shippers opposing the proposed rate increases does not affect the evidence offered in support of the increases so adversely that there is a lack of substantial evidence in support of the Commission's findings.

The appellant refers (Jur. St. 8) to statistical evidence comparing total Kansas production of crushed stone, sand, gravel, chat and road aggregates with Kansas intrastate rail shipments of members of a particular association only, and not including their sales to railroad companies (R. 396, 406, Exs. 41-43). Significantly, the witness who presented that evidence admitted that (1) the bulk of the increasing Kansas production of these materials is at portable plants which do not have rail service, (2) there are service advantages in using trucks for relatively short hauls, and (3) the majority of truck shipments move for distances of less than 50 miles, while the majority of rail shipments move for distances of more than 50 miles (R. 407-408). Obviously, the level of the rail rates would have little bearing upon the extent of the transportation by truck from the portable plants.

On the other hand, the Commission was able to rely upon additional facts contained in its reported decisions revealing that the total Kansas intrastate rail volume of ship-

ments of these commodities (sand, gravel, and crushed stone) had remained at a relatively constant level for many years, during which there had been recurrent intrastate freight rate increases, thus demonstrating strongly that further increasing the rates on such commodities would not be self-defeating. In the instant case a traffic sampling, projected to a full year, showed that the annual Kansas intrastate volume of these commodities for a constructive year in 1958 and 1959 was 33,717 carloads (Ex. 36). This quantity compares closely with a volume of 36,184 carloads for a constructive year in 1956, referred to in *Kansas Intrastate Freight Rates and Charges*, 305 I.C.C. 335, 349, as well as annual movements of 31,781 carloads in 1950 and 30,336 carloads in 1947, referred to in *Kansas Intrastate Freight Rates and Charges*, 286 I.C.C. 501, 508.[4] In addition, in authorizing increases in the interstate rates on these commodities, the Commission had noted that the interstate traffic volume "had been maintained at a constant level" and concluded that a further rate increase would have "only a nominal effect on the volume of traffic moving by rail." *Increased Freight Rates, 1958*, 304 I.C.C. 289, 338.

Where, as Here, the Commission's Order is Supported by Substantial Evidence, the Court Cannot Substitute Its Views for Those of the Commission.

As outlined above in this motion (pp. 8-11), the finding of the Commission that the increases in freight rates would produce substantial increases in revenues is supported by substantial evidence. Under these circumstances the reviewing court cannot substitute its views upon the weight of the evidence for those of the Commission. *Cleveland Electric Illuminating Co.* v. *United States*, 147 F. Supp. 622, 630 (N.D. Ohio, 1956), affirmed *per curiam* 354 U.S. 917 (1957); *Alabama* v. *United States*, 141 F. Supp. 488,

[4] These statistics were called to the Commission's attention in the oral argument (R. 471).

495 (N.D. Ala., 1956); *South Carolina* v. *United States*, 136 F. Supp. 897, 902 (E.D. S.C., 1956), affirmed *per curiam* 351 U.S. 944 (1956); *King* v. *United States*, 101 F. Supp. 941, 945 (N.D. Fla. 1951), affirmed 344 U.S. 254 (1952); *United States* v. *Louisiana*, 290 U.S. 70, 80 (1933).

Particularly pertinent are the observations of the reviewing court in *Arkansas Public Service Commission* v. *United States*, 147 F. Supp. 454, 464 (E.D. Ark., 1956), affirmed *per curiam* 355 U.S. 4 (1957), upon the very issue here involved, as follows:

> "The Arkansas Commission also contends that the increase will cause a large amount of present rail traffic to be diverted to trucks and that, as a result, the increases will not produce additional revenue to the rail carriers, and that the Interstate Commerce Commission's finding to the contrary is not supported by substantial evidence. There was much—we think quite substantial—evidence, both ways, on this issue, and it was, thus, one of fact, for resolution by the Interstate Commerce Commission, and its finding thereon must be held to be supported by substantial evidence."

The most recent decision of this Court in reviewing issues similar to those of the instant case is *North Western-Hanna Fuel Co.* v. *United States*, 161 F. Supp. 714 (D.C. Minn., 1957), affirmed *per curiam* 356 U.S. 581 (1958). There the district court declared (161 F. Supp. 719):

> "The danger of diminishing freight revenues by the imposition of increased freight rates is always a relevant and formidable factor for the Commission to consider when such increases are promulgated. The nationwide impact of the increased rates under Ex Parte No. 175 no doubt is well known to the Commission. And that body is in a far better position than the Court to appraise and weigh the diverse opinions of witnesses for the railroads, the shippers, and the consumers in this regard. We cannot say, or even assume to predict, which prophetic opinions as to the

impact of higher freight rates are the most sound and reliable. We assume, however, that the railroads will avail themselves of any rights they may have to meet any such increased competition by decreasing their rates below the increases permitted under Ex Parte No. 175 when competitive circumstances suggest such adjustments."

CONCLUSION.

For the foregoing reasons we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should therefore be affirmed.

Respectfully submitted,

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July 12, 1963

PROOF OF SERVICE.

I, Harvey Huston, counsel of record for railroad appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 12th day of July, 1963, I served copies of the foregoing Motion to Affirm on the several parties as follows:

On plaintiff-appellant by mailing copies, with air mail postage prepaid, to Byron M. Gray, 700 KPL Tower, 818 Kansas Avenue, Topeka, Kansas, and Robert Londerholm, State Corporation Commission, State Office Building, Topeka, Kansas.

On the United States by mailing copies with air mail postage prepaid, to the Solicitor General, Washington 25, D.C.; John H. D. Wigger, Attorney, Department of Justice, Washington 25, D.C.; and Newell A. George, United States Attorney, Topeka, Kansas.

On the Interstate Commerce Commission by mailing copies, with air mail postage prepaid, to Robert W. Ginnane, General Counsel, and Stanton P. Sender, Attorney, Interstate Commerce Commission, Washington 25, D.C.

.....

Harvey Huston

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 217

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment of a three-judge district court, which dismissed appellant's complaint challenging an order entered on July 31, 1962, by the Interstate Commerce Commission. The Commission's order, issued under Section 13(4) of the Interstate Commerce Act, required railroads operating in Kansas to increase *intrastate* freight rates

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and charges on certain specified commodities to the same extent as the *interstate* rates on these commodities had been previously increased pursuant to the Commission's approval in two nationwide revenue proceedings.

The purpose of the Commission's order is to require the intrastate traffic on these commodities to contribute its fair share of the carriers' revenue needs. The detailed findings upon which the order is based appear in the Commission's report dated December 1, 1961, *Kansas Intrastate Freight Rates and Charges,* 315 I.C.C. 223 (J.S. 22–57).

The nationwide revenue cases which form the background of this litigation are designated as *Ex Parte No. 206, Increased Freight Rates, E. and W. Territories, 1956,* 299 I.C.C. 429, and *Increased Freight Rates , E., W., and S. Territories, 1956,* 300 I.C.C. 633; and *Ex Parte No. 212, Increased Freight Rates, 1958,* 302 I.C.C. 665, and 304 I.C.C. 289. In Ex Parte No. 206, the Commission, on August 6, 1957, authorized a general increase of 12 percent, with exceptions, in the freight rates and charges for interstate transportation within western territory. (J.S. 24–25, 56.) In Ex Parte No. 212, the Commission on September 9, 1958, authorized certain additional increases in interstate rates and charges. (J.A. 25–26, 56.)

Following these nationwide increases, the thirteen principal railroads operating in Kansas[1] petitioned

[1] These railroads are: The Atchison, Topeka and Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Garden City Western Railway Company; The Kansas City Southern Railway Company; Kansas City Terminal Rail-

the State Corporation Commission of Kansas for authority to adopt corresponding increases in rates for intrastate transportation within Kansas. The Kansas commission, while authorizing most of these increases, excepted certain commodities. (J.S. 25.)[2] On October 26, 1959, the same carriers sought relief from the Interstate Commerce Commission to the extent that it had been denied by the Kansas commission.

Pursuant to Section 13(4) of the Act, the Commission instituted an investigation into the lawfulness of the Kansas intrastate freight rates and charges covering the excepted commodities. All railroads operating in Kansas subject to the Commission's jurisdiction were made respondents in this proceeding. Copies of the order of investigation and notice of hearing were also served on the State of Kansas and the Kansas commission. (J.S. 23–24.)

In its decision, the Commission found that the

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way Company; Kansas, Oklahoma & Gulf Railway Company; Midland Valley Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Northeast Oklahoma Railroad Company; St. Louis-San Francisco Railway Company; and Union Pacific Railroad Company.

[2] The commodities refused increases corresponding to Ex Parte No. 206 are: sand; gravel; crushed stone, including chat; building aggregates, including expanded clay or shale cinders; agricultural limestone; brick; clay sewer pipe; clay drain pipe and related articles; bituminous coal; petroleum and petroleum products, including liquified petroleum gas; and cement. The commodities refused increases corresponding to Ex Parte No. 212 are: sand; gravel; crushed stone; chat; road aggregates; lightweight building aggregates; agricultural limestone; brick; clay sewer pipe, drain tile and related articles; bituminous coal; petroleum and petroleum products, and hay.

intrastate freight rates and charges on crushed stone, sand, gravel, road aggregates, chat, and agricultural limestone; clay draintile, clay sewer pipe, and related articles; lightweight building aggregates, including expanded clay or shale cinders, hay, and petroleum and petroleum products are abnormally low; are not contributing their fair share of the revenues required by the carriers; and, to the extent that these rates are lower than present interstate rates, they cause, and for the future will cause, undue, unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It further held that the new intrastate rates would increase the revenues of the railroads by substantial amounts.

As to intrastate rates on bituminous coal, refractories and related articles, the Commission found, on the other hand, that the present rates would not unduly burden interstate commerce (J.S. 53–54), because there was no basis for concluding that the increased rates would provide a net revenue gain. (J.S. 42, 45.)

The district court, after a careful review of the evidence (J.S. 8–14), unanimously concluded that the Commission's findings were supported by substantial evidence (J.S. 15). Appellant contends, as it did below, that the lower Kansas intrastate rates were not an undue burden upon interstate commerce because higher intrastate rates would divert traffic from the railroads. The district court noted that railroad witnesses familiar with the rates and revenues of the railroads involved had persuasively testified that, while there might be some traffic diversion because of

increased rates, the net result would be increased revenues (J.S. 14). In the opinion of the court, the conclusion of the Commission was based upon "substantial evidence" and "supporting data" (J.S. 7).

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court.

1. Appellant argues (J.S. 5–10) that the evidence does not support the Commission's finding as to the effects which the increases will have on carrier revenues. The court below, however, carefully reviewed the evidence (J.S. 8–14)—consisting of detailed traffic data analyzed by expert witnesses—and concluded that the findings were adequately supported in the record. There is no occasion for further review of these factual issues. *Radio Corporation of America* v. *United States,* 341 U.S. 412, 420; *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491; *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U.S. 515, 536.

2. Appellant suggests that the trial court, in determining the substantiality of the evidence to support the order, misconceived the scope of judicial review contemplated by Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009(e). It says, in this connection, that the court looked only to evidence supporting the Commission's order, and did not consider the cross-examination, the findings of the trial examiner, and opposing testimony. (J.S. 6.)

Appellant, it is to be noted, does not question that the Commission, in its report, considered the opposing

testimony presented (J.S. 33–35, 36–38, 43–50); the cross-examination (J.S. 26–27, 50–51); and the findings of the trial examiner (J.S. 23, 27).[3] Moreover, the claim that the district court looked at only one side of the picture is refuted by the opinion below. Thus, the court quotes a portion of the cross-examination (J.S. 9–10); refers to the examiner's rulings on evidentiary points raised by appellant (J.S. 7); and specifically discusses appellant's contention as to possible diversion of traffic resulting from increased rates (J.S. 6, 7, 8, 14). It clearly appears that it examined the sufficiency of the evidence on the record considered as a whole.

3. Appellant urges finally that the court below erred in holding (1) that the 1958 amendments to Section 13(4)[4] made it unnecessary to consider the effect that an increase in rates might have upon the volume of the intrastate movement of a commodity, and (2) that the 1958 amendments permit the Com-

[3] The care with which the Commission scrutinized the evidence is shown by its treatment of the commodities for which increases were not authorized. With respect to refractories and related articles, the increases were rejected because of a complete failure of proof regarding intrastate shipment (J.S. 42). The proposed increases in rates for bituminous coal were rejected on the basis of substantial evidence that the increases would not only result in undue diversion to competing modes of transportation but would also result in decreased consumption of coal *vis-a-vis* other fuels (J.S. 44–45).

[4] The 1958 amendments followed the decisions of this Court in *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Illinois*, 355 U.S. 300, and *Public Service Commission of Utah* v. *United States*, 356 U.S. 421. The lower court decision interpreting these amendments, *Utah Citizens Rate Association* v. *United States*, 192 F. Supp. 12 (D. Utah), was affirmed by this Court, *per curiam*, 365 U.S. 649.

mission to base a finding that increased intrastate rates will result in a net gain in revenue upon the testimony of railroad traffic officers that revenues generally have increased following past general increases in freight rates. Obviously, however, there is no occasion to decide in this case whether the Commission must find that increased intrastate rates will increase the carriers' net revenues. The Commission specifically found that the increases ordered "will result in a substantial increase in the [railroads'] revenues" (J.S. 51). It also disallowed increases in instances where the prospect of increased revenues was not shown. (J.S. 42, 45.)

Moreover, the Commission's determination was not based upon a view that the 1958 amendments had relaxed evidentiary requirements in this respect. The Commission found that the informed judgment of railroad traffic officers, *i.e.*, their testimony that there would be an increase in revenues, was entitled to considerable weight, citing *United States* v. *Louisiana*, 290 U.S. 70, 80; *State of South Carolina* v. *United States*, 136 F. Supp. 897, 899–902 (E.D.S.C.), affirmed, 351 U.S. 944; and *State of Alabama* v. *United States*, 141 F. Supp. 488 (N.D. Ala.) (J.S. 51). The Commission also observed that the statements of these railroad witnesses that a net gain in revenue would result were supported by data which they submitted (J.S. 51.) The district court, in turn, pointed out that the evidence on which the Commission based its conclusion that an increase in intrastate rates would not substantially divert traffic from the railroads, but would increase their revenues without an appreciable

increase in expenses, was both documentary and direct. (J.S. 8.) After reviewing this evidence in detail (J.S. 8–14), the court concluded that these witnesses, "* * * representing the railroad systems operating in Kansas, and familiar with the traffic rates and revenues of the various companies, testified with certainty that while there might be some diversion of traffic (by reason of the increase in rates) the net result of the increase of rates would be to substantially increase revenues. * * *" (J.S. 14). Since the court below held in substance (J.S. 7) that the Commission's findings were based upon evidence which was substantial under the pre-1958 cases, this case does not present the question whether the amendments of that year relaxed pre-existing evidentiary requirements.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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No. 217

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

On Appeal From The United States District Court
For The District of Kansas.

BRIEF OF APPELLANT OPPOSING MOTION TO AFFIRM.

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STATEMENT.

The Appellees, the Interstate Commerce Commission and the United States of America, have filed a motion to affirm; the rail appellees have filed separate motion. Both are based on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

It will simplify the issues to state at the outset that Appellant does not contend that the Commission was required to make a finding of reasonableness as to each specific rate. Neither does Appellant contend that the Commission failed to make any required finding or conclusion. Specifically Appellant does not contend that the Commission failed to find that a net revenue benefit to the rail lines would result from an increase in the involved rates. *Appellant does contend that the evidence was insufficient as a matter of law to support this finding.*

ARGUMENT.

The basic question raised by this appeal is whether or not specific Kansas intrastate rates may be ordered increased upon evidence dealing soley with operating and revenue results on the entire traffic of the various railroads. No rail witness, with the single exception of a witness on bituminous coal, qualified as having any knowledge of the particular commodities involved in this proceeding. Based solely upon statistics as to the effect of former systemwide general increases on the entire body of freight rates, each rail witness was permitted to give his opinion that an increase in Kansas intrastate rates on these specific commodities would result in a net revenue benefit to the rail carriers. As stated by the Interstate Commerce Commission in its decision, referring to the testimony of these rail witnesses:

> "Their [rail witnesses'] statements that a net gain in revenue will result are supported by data showing that revenues generally have increased following the

application of authorized rate increases." (Jur. St. App. 51)

Data as to results of general increases applied to all traffic was the sole basis for the opinion each witness was permitted to give.

The increase cases such as *Ex Parte No.* 206[1] and *Ex Parte No.* 212[2] were general revenue cases involving the proposition that the entirety of the traffic was not producing sufficient general revenues, and that the whole level of rates should be horizontally raised to make up the deficiency. The proof in such a case was appropriate to the proposition that the general revenues were inadequate by a certain over-all amount and that a horizontal increase of a certain percent would not produce an excessive revenue. The present case arises from a rail petition to the Interstate Commerce Commission alleging that the Kansas intrastate rates on certain named commodities are so low as fail to earn their fair share of the necessary rail revenue and hence constitute a burden upon interstate commerce. The evidence must be appropriate to the proposition that raising the rates on these separate commodities will bring added net revenues to the carriers. No such evidence was adduced.

The District Court construed the 1958 amendment to Section 13(4) of the Interstate Commerce Act as permitting the Interstate Commerce Commission to order an increase in specific intrastate rates without consideration of evidence concerning the revenue producing characteristics of

1 299 ICC 429, 300 ICC 633.
2 302 ICC 665, 304 ICC 289.

the separate commodities. This appears conclusively from the following excerpts from the decision of the District Court:

> "It is clear to the Court, after examining this section and the entire record, that whether or not the rates imposed by the Kansas Corporation Commission have created an unreasonable or unjust discrimination against interstate commerce is determined primarily by criteria or factors pertaining to the over-all profitable operation of the railroad carriers involved in interstate commerce . . . . However, in the final analysis, it is system wide experience that warrants the greatest consideration because, in that way, the purposes of the Interstate Commerce Carrier Act can best be effectuated. Furthermore, the Interstate Commerce Commission must construe the act to 'promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation . . .' In addition, since section 13(4) above set out provides specifically that the Interstate Commerce Commission may find without a separation of interstate and intrastate property, revenues, and expenses and without considering in totality the operations or results thereof of any carrier, or group of carriers, wholly within any state, further emphasis must be placed on the necessary profitable operation of the interstate carriers. *Under such circumstances, it seems unnecessary to discuss previous cases which considered the revenue from various commodities and products separately and which considered the effect that an intrastate rate increase might have upon the railroad's intrastate traffic in that commodity.*" (Jur. St., App. A, 5-6) (Emphasis supplied)

Based on evidence dealing only with the total revenue results on the entire consist of rail traffic throughout the rail system each rail witness testified that it was his

opinion that the rail lines would receive added revenue by increasing these particular rates. Each witness restricted the basis for his opinion to the data as to entire system traffic shown on his exhibit. An example will suffice to illustrate. Rail appellees use Witness William R. Wientage in their Motion to Confirm as an example of a witness supplying evidence that "the proposed rate increases might reasonably be expected to produce substantial additional revenues." (Rail Motion 8-9). The District Court did likewise. (Jur. St., App. 13)

Witness Wientage qualified as being a Commerce Assistant for the Frisco Railroad. (R. 181) He offered in evidence Exhibit No. 25. This exhibit showed by years, 1946 through 1959, the total tons of freight carried by the Frisco and the total gross freight revenue received. The witness had no knowledge, nor did he qualify as having any knowledge, concerning the particular commodities involved. Over objection that the witness had not qualified to answer the question, the witness, to the question "do you have an opinion as to whether the rate increases proposed in this case would result in increased freight revenue?", was permitted to testify as follows:

> "My opinion is that my Exhibit No. 25 indicates that the various ex parte increases have resulted in increased revenues for the Frisco, and that the application of the increases here sought will result in a further revenue increase." (R. 185)

This was the tenor of the testimony accepted by the Commission and on which it reached its conclusion that

the increases "will increase the revenues of the respondents by substantial amounts". (Jur. St., App. 54).

The State of Kansas contends that the evidence submitted by the rail lines does not support the finding that the increase of these specific rates will result in a net revenue benefit to the railroads. The 1958 amendment to Section 13(4) of the Interstate Commerce Act did not relieve the proponents of increased intrastate rates on specific commodities from the burden of showing that an increase in the rates on the specific commodities will result in added net revenues for the railroads. Evidence that general increases in all rates had in the past resulted in a net revenue benefit to the rail lines does not in itself establish that an increase in particular rates will have the same effect. Rail witnesses admitted that as to many commodities this had not been the effect in general increase cases.[3] In fact the principal rail witness declined to prognosticate as to whether or not increases in revenue would result from increasing the rates as to specific commodities here involved.[4] He confined himself to the opinion that applying the increases to all of the commodities here involved would in its sum total result in a net revenue benefit to the rail lines. He based this opinion, as did all the other rail witnesses, not upon any knowledge of the particular commodities, but upon the basis of the revenue results of past general increases applied to the entire consist of the system traffic. (R. 92-93). This is not adequate evidence upon which the Commission could make the finding that an in-

3 E.g. Witness Verchota, R. 179.
4 E.g. Witness Roberts, R. 105

crease in the rates on each of these commodities would, as to each such commodity, result in additional net revenues for the carriers.

Appellant does not contend that the District Court must weigh the evidence to determine what it would have decided in the first instance, had it had original jurisdiction of the subject matter. Appellant insists that under Section 10(e) of the Administrative Procedure Act, the trial court was required to review the whole record, including the Examiner's proposed report, to determine whether or not in view of the entirety of the evidence there was substantial evidence to support the findings of the Commission. The Court went no further than to determine that the evidence above referred to was sufficient as a matter of law to support the order of the Commission. This is confirmed by the statement of the District Court that,

> "... it seems unnecessary to discuss previous cases which considered the revenue from various commodities and products separately and which considered the effect that an intrastate rate increase might have upon the railroad's intrastate traffic in that commodity." (Jur. St., App. 6)

To say that it is unnecessary to consider the effect a rate increase might have on the railroad's intrastate traffic and revenues on the various products and commodities considered separately, as the District Court states, is simply to say that the Commission has the power to order the intrastate rates on a commodity raised even if it were accepted that to do so would result in loss of traffic and revenue. It seems unlikely that this can be the law. Cer-

tainly the propostion has not been approved by this Court up to the present time.

Appellant submits that there has been no change in the law to relieve the Commission or the Court from considering the effect that an intrastate rate increase might have upon the railroads' intrastate traffic and revenues on the particular commodities involved in the proceeding; that it was the duty of the District Court to review the whole record to determine as a matter of law whether or not there was sufficient evidence to support the finding that an increase in revenue will result from an increase in rates; that evidence of results of former general increases applied to the entire consist of the traffic of a railroad is insufficient as a matter of law to support a finding as to probable results of applying an increase to a particular commodity moving in intrastate traffic. The cases relied upon by appellees do not support a contrary doctrine.

Louisiana Public Service Commission v. United States, 125 F. Supp. 180, (affirmed per curiam 348 U. S. 885), involved principally the question as to whether or not the findings were sufficient. The District Court held that the findings and the evidence to support them both were sufficient. No recital of the evidence appears in the District Court opinion. Resort to the opinion of the Commission discloses that the evidence consisted in part of a traffic and revenue study of the particular commodities covering a six year period, and the experience of the railroads in applying intrastate increases to these separate commod-

ities over that six year period. The finding of the Commission was based specifically upon this evidence.

Arkansas Public Service Commission v. United States, 147 F. Supp. 454 (Aff. per curiam 355 U. S. 4) is similar to the *Louisiana case, supra*. Resort to the report of the Commission discloses that the rail lines put in evidence an eight year study of the separate commodities showing the results over the eight years of applying intrastate increases in Arkansas to these specific commodities. The Commission relied upon this study for its finding that an increase in rates would result in additional revenue.[6]

In *Cleveland Electric Illuminating Co. v. United States*, 147 F. Supp. 622, the District Court did not get to the question as to whether or not the evidence was sufficient to support the finding of discrimination against interstate commerce. The Interstate Commerce Commission had found, *inter alia*, that the intrastate rates created undue preference and prejudice as between intrastate and interstate shippers. The Court sustained this finding, then stated that having done so, "we are not required to pass upon the validity of its [the Commission's] conclusion in respect of revenue discrimination".

In *State of Alabama v. United States*, 141 F. Supp. 488, the rail lines put on elaborate evidence concerning the specific commodities by witnesses who qualified as having many years experience in the movement of these very commodities. The District Court abstracts much of this evidence in a footnote to its opinion.[7]

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5 **Louisiana Intrastate Freight Rates and Charges**, 291 ICC 279, l.c. 289-313 incl., and App. B pp. 317-318.

6 **Arkansas Intrastate Freight Rates and Charges**, 298 ICC 547, p. 559.

7 141 F. Supp. 488, footnote, 12 pp. 495-497.

The case principally relied on by Appellees and which appears to have misled the Commission and the District Court is *South Carolina v. United States*, 136 F. Supp. 897 (aff. per curiam 351 U.S. 944). The case does not support the proposition that probative evidence as to the probable effect of rate increases on the specific commodities is not required. In that case the traffic officials of the various Southern railroads made a study of the experience they had had in applying the same increases to the same commodities moving interstate. The District Court particularly notes that the finding of the Commission that added revenue would result from applying the increases intrastate was supported by this evidence of the result of applying them interstate on the separate commodities; that the opinion of the traffic witnesses was not given "ex cathedra".

There has been no case in any court where an order requiring a change in state rates has been sustained on such evidence as we have here. Always there has been evidence concerning the specific rates, and witnesses who qualified on *voir dire* as having knowledge of the specific rates and whose opinion thereon could be tested by cross-examination. The attempted cross-examination of Witness Kroll, whose testimony was relied on by the District Court,[8] and the rail appellees[9] demonstrates the *cul de sac* one runs into in an attempt to cross-examine a witness who has been permitted to testify without proper qualification. This is particularly true of rail witness Roberts, heavily relied

8 Jur. St., App. 10.
9 Rail Motion to Confirm 10-11.

upon by the Court as giving testimony to support the order.[10] Cross-examination of this principal rail traffic witness is a study in futility. Finally it came to the following:

> Q. On your exhibit 19 you give the trend of the Santa Fe's freight traffic tonnage and revenue for the years 1946 to 1959. That includes, does it, the total tonnage, carload, less carload and everything?
>
> A. Yes.
>
> Q. On all commodities?
>
> A. Yes, sir.
>
> Q. And it has no specific reference to any of the commodities in this proceeding?
>
> A. Not specifically, no.
>
> Q. Well, as it relates to this proceeding, what conclusion do you draw from this exhibit?
>
> A. I think I covered that in my testimony.[11]
>
> Exam. Fittipaldi: Sir, just answer the question, if you can.
>
> A. The conclusion is that while the tonnage has increased over 1946 and the revenue also has increased over 1946, the revenue increase has been greater percentagewise than the tonnage increase.
>
> Q. On all commodities?
>
> A. All commodities, that is what it covers.
>
> Q. You don't relate it to any specific commodities?
>
> A. No, sir. (R. 79-80)
>
> • • • • •
>
> Q. . . . I would like to ask you just what study you made as a basis for that conclusion, if any? [The

10 Jur. St., App. 12.

11 On direct the witness had testified, "It is my considered opinion that generally such diversions under the proposed increases also will be small." (R. 54)

conclusion that the increases would cause only small diversion of the specific commodities.]

A. We made no specific study.

Q. At all?

A. No, sir. (R. 92)

Appellees point out that the Commission denied increases on bituminous coal and on refractories and related articles and reason that this lends assurance of the lawfulness of the order.[12] As to the latter, there had been no rail movement in the past, hence the Commission was forced to find, as it did find, that there was "no basis for the essential finding that the increases would produce a net revenue gain."[13]

As for bituminous coal, it was the only commodity on which the rail appellees produced a witness who qualified on *voir dire* to testify concerning a specific commodity.[14] It is significant that on the one commodity on which a witness was produced who was qualified to answer questions on cross-examination, the Commission denied the increases. Actually the Commission found that coal production in Kansas had declined 70.7 percent between 1946 and 1959, whereas nationally the decline had been only 23.2 percent, and that in the prior Kansas proceeding it had refused to increase the Kansas coal rates because the decline in coal production in Kansas convinced it that rate increases could not produce added revenue.[15]

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12 Rail Motion to Affirm, 14; Government Motion to Affirm, 4.
13 Jur. St., App. 42.
14 Witness William A. Streck, R. 127 et seq.
15 Jur. St., App. 44-45.

The fact that after this proceeding was instituted the carriers voluntarily reduced the rates on cement and brick and related articles,[16] is significant. After the decision of the Commission the carriers voluntarily reduced rates on other items, which was the occasion for the second petition for rehearing mentioned at page 4 of the rail Motion to Affirm. As recently as June 17, 1963, these same rail carriers filed petition with the Interstate Commerce Commission for modification of its order to permit a reduction in certain Kansas intrastate rates on cinders, clay, shale, etc., which rates were required to be increased by the order here under consideration. And on July 3, 1963 the rail carriers filed a petition to correct certain intrastate rates on various petroleum products because the intrastate rates published pursuant to the order are higher than the level now being maintained interstate on the same items.[17] All of this strongly indicates that the order of the Commission is a mere sub-delegation to the rail carriers of the control over the Kansas intrastate rates which the Commission has erroneously taken from the appropriate Kansas agency.

This Court has time and again asserted that before federal power may be exercised in the area reserved for state jurisdiction the evidence to justify such execution of federal power "must meet a high standard of certainty". *State of Florida v. United States,* (1931) 282 U. S. 194; *Illinois Central R. Co. v. Pub. Utilities Commission,* (1918) 245 U.S. 493; *Public Service Commission of Utah v. United*

16 Jur. St., 25, 26.
17 Petitions filed in ICC Docket No. 33239.

States (1958), 356 U. S. 421. If the proof offered here is to be held sufficient, then state control of its own commerce has indeed disappeared.

It is submitted that the evidence supporting the order of the Commission was insufficient as a matter of law, and that the District Court erred in holding that it is unnecessary to consider "the revenue from various commodities and products separately" or to consider "the effect that an intrastate rate increase might have upon the railroad's intrastate traffic in that commodity."

The Motion to Confirm should be overruled.

Respectfully submitted,

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